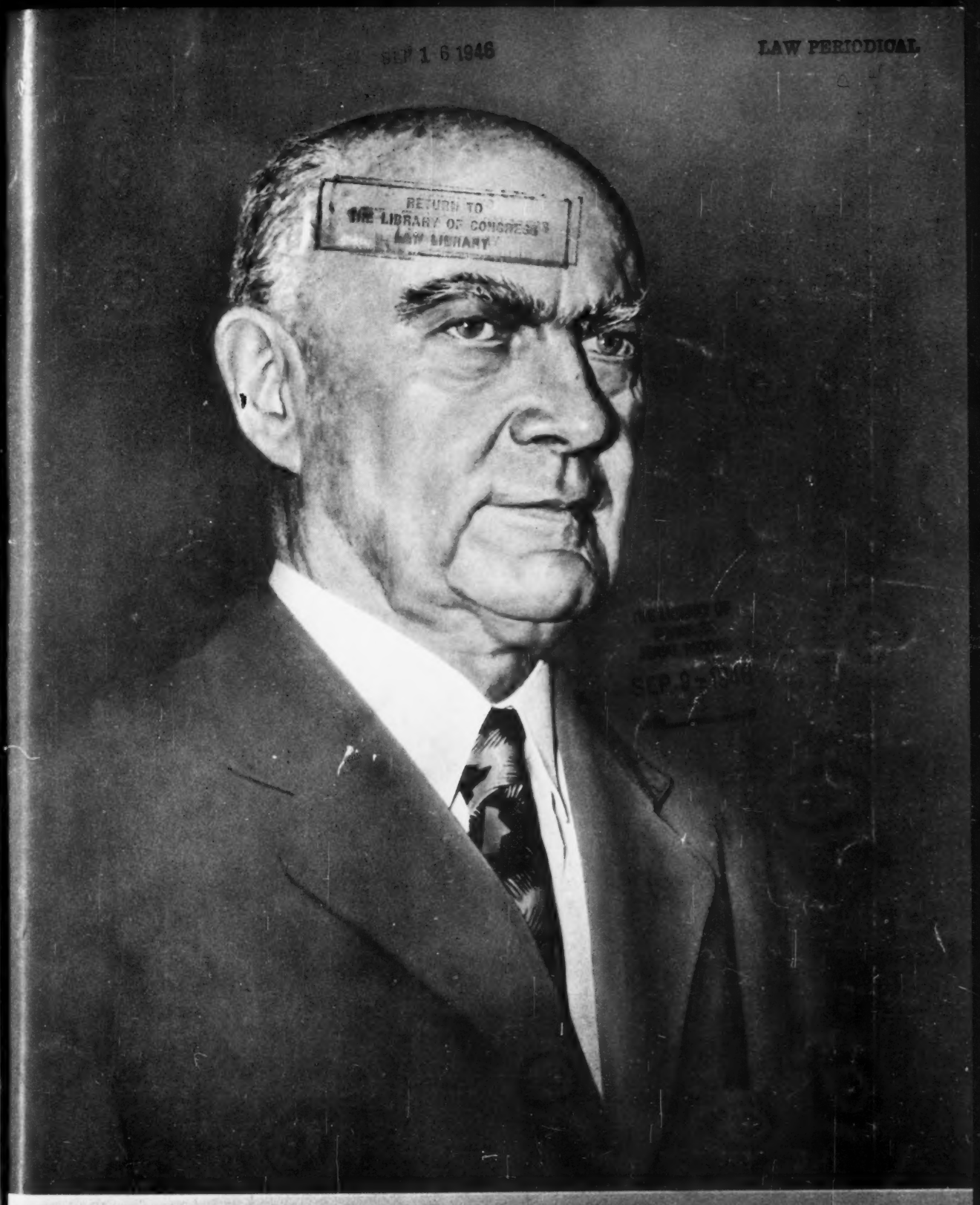


HATTON W. SUMNERS

AMERICAN BAR ASSOCIATION JOVRNAL

September 1946

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by AMERICAN BAR ASSOCIATION at 1140 North Dearborn Street, Chicago 10, Illinois.
Entered as second class matter Aug. 25, 1920, at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912.
Price: per copy, 75c; to members, 50c; per year, $3; to Members, $1.50; to Students in Law Schools, $1.50. Vol. 32, No. 9.

Contents

In THIS ISSUE

Judge Hatton W. Sumners

The adjournment of the 79th Congress brought to a close his distinguished career in the House of Representatives. As Chairman of the Committee on the Judiciary, he has been identified with much constructive legislation. In wishing him Godspeed and many years of health for the continuance of his advocacy of American ideals of government, we place on the cover of this issue the portrait of this valiant member and friend of the American Bar Association.

Proposes Law Center

Dean Arthur T. Vanderbilt, of the New York University Law School, has written a very timely article expressing the hope that the leadership always shown by our country's lawyers can be reaffirmed through the formation of a Law Center, where a more complete and comprehensive program could be offered to both students and practising lawyers in an attempt to increase the efficacy of our present Law Schools' curricula.

The Historian and the Lawyer

Ben W. Palmer has written brilliantly of the similarities in their problems, as to their witnesses and evidence. He points to some revisions of accepted versions of events and historical characters.

Great Leaders of the Bar

To start a series of occasional articles reminiscent of the careers and personalities of lawyers who were exemplars of the ideals of the profession, the Editor-in-Chief of the JOURNAL has sketched David T. Watson, of Pittsburgh, who at the turn of the century was regarded as one of the ablest lawyers in the history of the American Bar. Sketches of other exemplars of the profession will be published from time to time.

Trial and Punishment of Nazi Criminals

As the Nuremberg trial comes to a close, American lawyers will be interested in Tappan Gregory's personal observations as to the legal bases for the indictment and trial, the fair and just hearing accorded to the accused, and the high character and judicial capacity of the International Military Tribunal which will render the verdict.

"The World's Most Influential Lawyer"

We publish the full text of Trygve Lie's summary of his first report to the General Assembly of The United Nations, which American lawyers will welcome to this Continent on September 23. It gives the facts as to the work which the United Nations has thus far advanced; also, the obstacles and problems which confront it now. Every lawyer should read carefully this forthright statement by this lawyer who has become one of the strongest personalities in the Organization, and should then help to give "united American support to The United Nations", as voted by the House of Delegates on July 2.

"The Cult of The Robe"

A summary of a notable exchange of views, clashing concepts of the Courts, first as to the wearing of gowns by judges, but also as to many other things.

Victory as to the World Court

The vote of 60 to 2 in the Senate for American acceptance of the compulsory jurisdiction of the International Court of Justice completed the Association's "grand slam" as to its legislative objectives. The other two measures were the unanimous passage of the Administrative Procedure Act and the $5,000 increase in the salaries of all Federal judges, which is also reported in this issue.

Courts and Politics

Charles C. Burlingham has sent us a forthright letter written seventy years ago by Chief Justice Morrison R. Waite, as to his concept of his duty to remain aloof from politics and controversies.

The Association's Constitution

Notice is given of proposed amendments of the Constitution and By-laws, which are to be voted on by the members present at the Annual Meeting in Atlantic City during October 28-November 1.

"Books for Lawyers"

Our leading review this month is by Charles P. Curtis, Jr., of Choate, Hall and Stewart, Boston, the gifted co-author of *The Practical Cogitator*, which Reginald Heber Smith reviewed in 32 A.B.A.J. 272-274. Mr. Curtis writes of *The Lowells and Their Seven Worlds* (see 32 A.B.A.J. 560), but he deals almost exclusively with those of the Lowell lineage who were lawyers, from the earliest colonial days.

"Letters to the Editor"

In a lively exchange, Herbert L. Nossaman, of Los Angeles, challenges Ben W. Palmer's references to the juristic philosophy of Mr. Justice Holmes; and Mr. Palmer replies that he has a deep admiration for Holmes as a great personality, but nonetheless he has felt compelled to challenge the consequences of the juristic philosophy of the pragmatists, as Roscoe Pound and Mr. Justice Jackson have done.

ANNUAL MEETING — Atlantic City, N. J.
October 28 — November 1, 1946

The Sixty-ninth Annual Meeting of the American Bar Association will be held at Atlantic City, New Jersey, October 28 to November 1.

Members are requested to transmit their requests for hotel reservations on the form provided on page 318 of the May, 1946, issue of the JOURNAL, to the American Bar Association, Reservation Department, 1140 North Dearborn Street, Chicago 10, Illinois.

HOTEL ACCOMMODATIONS
Headquarters — Convention Hall

IMPORTANT: The number of single rooms is *very limited*. Twin bedrooms will not be assigned to one person. In requesting reservations, five hotels should be selected in order of choice.

Hotel accommodations, with private bath, are available, as follows:

BOARDWALK HOTELS:

	Single	Double	(2 persons) Parlor suites
Ambassador	$6.00-$ 9.00	$9.00-$14.00	$25.00-$26.00
Breakers	3.50- 5.00	5.00- 12.00	
Brighton	7.00	9.00- 14.00	18.00- 24.00
Chelsea	4.75- 6.75	7.00- 12.00	
Claridge	ALL SPACE EXHAUSTED		
Dennis	6.00- 8.00	9.00- 14.00	
Haddon Hall	7.00- 10.00	10.00- 18.00	34.00
Marlborough-Blenheim	6.00- 10.00	9.00- 16.00	27.00- 36.00
Mayflower	5.00- 6.00	7.00- 12.00	
President	7.00- 10.00	9.00- 15.00	18.00- 25.00
Ritz-Carlton	6.00- 8.00	9.00- 14.00	30.00- 35.00
St. Charles	5.00- 12.00	7.00- 14.00	
Seaside	5.00- 11.00	8.00- 14.00	
Shelburne	6.00- 9.00	9.00- 12.00	
Strand	4.50- 6.00	9.00- 12.00	

AVENUE HOTELS:

	Single	Double
Colton Manor		$8.00-$12.00
Columbus		6.00
Crillon		8.00- 10.00
Eastbourne		7.50- 8.00
Flanders	$5.00	7.00- 9.00
Fox Manor Hotel		6.00- 8.00
Jefferson	6.00	7.00- 10.00
Kentucky	3.50	6.00- 7.00
Lafayette	5.00- 6.00	8.00- 10.00
Madison	4.50- 6.00	7.00- 10.00
Monticello		7.00
Morton	5.00	6.00- 8.00
Senator	4.50- 7.00	7.00- 12.00
Sterling	4.00- 5.00	6.00- 7.00

NOTICE TO MEMBERS OF JUNIOR BAR CONFERENCE

NOTICE is hereby given that at the annual meeting of the Junior Bar Conference to be held at Atlantic City, New Jersey, on October 27, 28, and 29, 1946, there will be elected a chairman, vice chairman, and secretary, each for a term of one year, and a member of the Executive Council from each of the Second, Fourth, Sixth, Eighth, and Tenth Federal Judicial Circuits, each for a term of two years.

Pursuant to Section 4 (b) of Article IV of the By-Laws, notice is hereby given that the members of the Junior Bar Conference residing in the above-named Judicial Circuits (hereinafter referred to as Council Districts) may nominate candidates for the office of member of the Council from their respective districts by written petition, in each case, specifying the name of the person nominated, and the office for which nominated, containing the names of at least twenty endorsers, all of whom are residents of the district of the person nominated. The petition shall contain a brief biographical sketch of the background and qualifications of the candidate. It shall be submitted to the chairman, Lyman M. Tondel, Jr., 31 Nassau Street, New York 5, N. Y., not later than October 12, 1946. At the first session of the annual meeting the chairman of the Conference shall deliver to the chairman of the Nominating Committee all petitions submitted pursuant to this notice.

The Nominating Committee shall consider the candidates proposed by each of said petitions, as well as receive names of other candidates and report its Council nominees at the same time and place, and in the same manner that it reports the nominations for the officers of the Conference. The nominating committee shall also report the other names for whom nominating petitions have been received and considered. Other nominations for the Council may be made from the floor following the report of the Nominating Committee, as may other nominations also be made for officers. The election of the Council members shall take place at the same time and place and in the same manner as the election of officers, immediately following the conclusion of the second general session of the annual meeting, and shall be by written ballot.

TERM OF OFFICE: The term of office of the officers elected at the next annual meeting shall begin with the adjournment of the said annual meeting and end with the adjournment of the annual meeting to be held in 1947, or until their successors shall be elected and qualify, and the term of office of the Council members from the Second, Fourth, Sixth, Eighth and Tenth Federal Judicial Circuits shall begin with the adjournment of the 1946 annual meeting, and end with the adjournment of the annual meeting to be held in 1948, or until their successors shall be elected and qualify.

ELIGIBILITY: No person shall be elected as an officer or member of the Council if he will, during his term of office, become ineligible for membership in the Conference. The membership of a member of the Conference shall terminate at the conclusion of the annual meeting in the calendar year within which the member attains the age of thirty-six years, or upon his ceasing, prior to that time, to be a member of the American Bar Association. A person elected as a member of the Council shall be, at the time of his nomination, a resident of the Council District for which he is chosen. No person shall be eligible for election as a member of the Executive Council if he is then a member of the Council and has been such a member for a period of three consecutive years or more.

PLACE AND DATE: The annual meeting of the Junior Bar Conference of the American Bar Association will be held in Atlantic City, New Jersey, beginning October 27. Full plans for the meeting will be announced in subsequent issues of the JOURNAL and in *The Young Lawyer*.

T. JULIAN SKINNER, JR., Secretary
Junior Bar Conference of the
American Bar Association.

The Law School in a Changing Society: A Law Center

By Arthur T Vanderbilt

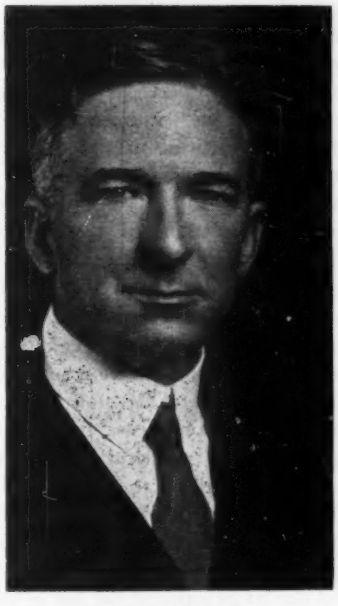
DEAN, NEW YORK UNIVERSITY SCHOOL OF LAW

During the war years, the law schools almost perished for lack of students; enrollments fell off eighty-five per cent. The determination of some institutions to survive was little short of heroic; one dean, seeking exemption from the rule as to the minimum number of full-time professors, maintained that he and his three part-time instructors could do justice to their two students, particularly as they were both in the same class! Curiously enough, throughout the war years when they might have been preparing to meet the complicated problems of the postwar period, most of the law schools ran accelerated all-the-year-around courses, largely for the benefit of 4F's and women students. When the history of legal education in America comes to be written, it will be interesting to see what justification can be found for this seeming absurdity. Most of the medical and engineering schools quickly abandoned acceleration as educationally undesirable.

Now the law schools are besieged with applicants for admission, the most experienced, the most eager, the most deserving our law schools have ever seen. These superior students run the very grave danger of emerging from two years of round-the-calendar studying with severe cases of intellectual indigestion, which it may take them, and the public they will serve, years to overcome. What was intended as a boon to the veterans may well turn out to be a positive disservice. Certainly the study of law is not—or at least should not be—less arduous than the study of engineering, or medicine, or less important to the public.

The Unsolved Problems of Legal Education

The question of acceleration, however, is the least of the unsolved problems of legal education inherited from pre-war days. Several years ago, I pointed out to my colleagues in the Association of American Law Schools that the lapses of the profession as I had observed them in visiting bar associations all over the country were, singularly enough, the very things in which legal education was deficient. Lawyers generally inclined to accept the courts and the system of practice therein for what it is, leaving to the courageous few the unenviable task of seeking to remedy the all too obvious defects in the administration of justice. But how many law schools have taught the administration of justice systematically and critically? Again, most members of the Bar scorn the criminal law as beneath their dignity (excepting, perhaps, anti-trust suits), an attitude quite incomprehensible to English lawyers, for their leaders often excel in such practice. But how many law schools pay more than lip service to criminal law in an attenuated first year course in the subject? American lawyers, moreover, thanks to the rigors of the case system, are skilled in the use of decisions, but how many of them are equally proficient in handling statutes or administrative regulations—



ARTHUR T. VANDERBILT

that vast volume of written law which today bulks so large in practice? But how many law schools have any course at all in statutes or legislative methods? How many have adequate courses in administrative law, Federal and State? A summary made eight years ago showed that less than half of the approved schools gave any courses at all in administrative law and most of them were slender (two hours for a single term) optional or post-graduate courses. American lawyers, at least before Dean Wigmore, Judge Hudson and Judge Ransom sought to arouse them, were peculiarly indifferent to the tremendous problems of foreign relations, world organization and international

law. What else could one expect when less than one-tenth of one per cent received any instruction in international law, for most schools gave no training in the subject and still fewer students availed themselves of it.

We must not forget, too, that we are living in One World, and that a large part of that world, particularly on this hemisphere, is governed by the civil law with which we must necessarily become increasingly familiar, if we are to maintain satisfactory cultural and commercial relations with our neighbors. Yet only a very few law schools attempt to cover this important field. In short, we have neglected the whole field of comparative law and of government and public law (except as the bar examiners have enforced a quick glance at constitutional law) to the tremendous detriment of the public and the profession. We are no longer qualified by technical training to maintain one of the great traditional functions of the Bar—leadership in the formulation and moulding of public opinion. By our neglect we have been turning our most precious birthright over to the political scientists, the economists, the sociologists and the practical politicians. And by our failure to attend to the manifest necessity of improving the administration of justice we have been paving the way for arbitration and the lay practice of the law generally. Not so many years ago a judge of the Court of Appeals of New York told me that the business men of a large city had all agreed to use arbitration rather than the courts, not that they liked the results of arbitration better, but because they could not afford the delays of the law.

"Taught law," said Maitland, "is tough law." Untaught law, conversely, is soft law, ineffective law, disappearing law, ultimately, dead law for which the law schools are clearly responsible. Now I think there has been no more effective teaching at the post-graduate level than in some of our law schools. The splendid work they have done in the field of business law by the use of the case system may help expiate the sins of neglecting many important branches of the law, but the blot—and it is large and black—remains on their escutcheon. Happily, signs are not lacking of a determination on the part of some legal educators to remedy these defaults.

Pressing Need for Continuing Resynthesis of the Law

Unfortunately, these are not the only matters with which the law schools must struggle. In dealing with their favorite field of private substantive law, there has long been growing a conviction that it was not right to permit students to graduate merely by passing a certain number of courses, but without any clear knowledge of the law as a system such as the student of a century ago got from Blackstone and Kent. There is a mounting consciousness of the pressing need for a continuing resynthesis of the law in this period of rapid change. The bare question of coverage is perplexing. Well over one-third of the pages in the *Annual Survey of American Law*, which seeks to present the significant legal developments of each year, are devoted to topics not ordinarily touched on in the law schools at all. As if our burden of teaching were not sufficient, we are also confronted with the fact that the law can only be taught adequately in the light of its economic, political and social environment, and not as a set of technical rules. That this new demand on the resources of the law schools is not academic has been strikingly demonstrated by Mr. Edward F. Johnson, General Counsel of the Standard Oil Company (New Jersey) in a speech before the Maryland State Bar Association last year, from which I quote a few trenchant sentences:

> Unless the lawyer is keenly sensitive to social trends, advice acted upon today is likely to fail to meet the test of judicial scrutiny years later. . . .
>
> We must remember that although a given set of facts may fit seemingly into a framework of statutory law as interpreted today, yet if the program is carried out, a situation may be created which, while not yet condemned by the courts, may be in conflict with the system of the statute, thus storing up trouble for the future. . . .
>
> To statute and decision has been added a new legal dimension—the dominant public interest. A lawyer's advice based upon a two-dimensional study of the law is likely to result in as great a distortion of reality and to be as flat as a two-dimensional painting without depth or perspective. A sound lawyer—sober, hardheaded and realistic craftsman that he is—pays heed to every relevant fact, whether or not that fact is to his liking.

To meet these sound standards of legal education is, indeed, a challenge to the law schools, particularly in view of the limited knowledge of all too many of our students in the realm of the social sciences.

Admittedly, the problem confronting modern law schools are many and complicated, but I submit a law school might master all of them and still fall far short of its duty and its exciting opportunity.

New Law Is a Protest Against Inadequacy of Traditional Law

We are living in a world of rapid change, particularly in natural science and invention, in industry and transportation and communication. A new mode of living—I had almost said a new civilization, but that would be too hazardous—is emerging. What we once identified as the natural "lag in the law" and merely accepted as a natural phenomenon is now regarded as a major defect in our jurisprudence which practical men have sought to remedy by voluminous legislation, administrative regulation and executive justice. The new law and the agencies which enforce it have been developing faster than we can acquaint ourselves with the new system. In the States in particular most of the new law is not even published. The new law is a protest against the inadequacy of our traditional law and the needless technicalities that like barnacles have impaired its usefulness. In part the new law, moreover, reflects the spirit of the age for power politics.

We like to think of our recent victory in arms as the triumph of law

over force and tyranny. So it was. But it still remains to be determined whether the victory will be lasting. Anyone reading his daily newspaper would scarcely be justified in saying that the battle for justice and reason has been won the world over. Even within our own country the conflicts between labor and capital, with government playing the role of appeaser, the widespread flouting of OPA regulations, the resurgence of crime, all serve to remind us that the battle for law, for justice, for reason, is still being waged.

Law Has Had to Cope with Periods of Rapid Change

On three earlier occasions has our law had to cope with periods of rapid change. In the first, as Maitland has pointed out in his Rede lecture, the leaders of the Inns of Court by destroying Star Chamber and regularizing the practice of Chancery insured the supremacy of the common law over the civil law in England. The struggle, as Maitland takes pains to point out, was not a placid encounter of disembodied ideas but the fierce struggle of leaders of the Inns of Court, the law schools of the day, to preserve the essentials of their native law while at the same time accepting all that was good in the newer law. Again, in the period of the Industrial Revolution, the American Revolution, and the French Revolution the transition to a new economic, political and social age was ably guided by the leaders of the bench and Bar. Mansfield, Hardwicke and Eldon, Burke, Bentham and Blackstone in England, and in this country Kent and Story, Hamilton and Jefferson, Jay and Madison, the framers of the Federal Constitution and the painstaking draftsmen in the several states, who laboriously adapted the statutes of England to the new commonwealths once more preserved the bulk of the traditional law while adapting it to the spirit of a new era. But in the period of the Jacksonian Revolution when equality in fact, as distinguished from the Jeffersonian equality of opportunity, was the grand objective, the bench found itself under attack and the Bar seemingly had lost its capacity for sagacious leadership. Judges appointed during good behaviour were replaced in most States by judges elected for short terms and thus subject to constant political pressure. The elective judges were deprived of the power to question witnesses, to comment on the evidence, or to charge the jury except in the language of requests submitted by counsel and before, instead of after, counsel had addressed the jury. One State, by constitutional provision, actually made the jury judges of the law as well as of the facts. The Federal judiciary was spared only because it was then relatively unimportant. The Bar failed both the profession and the public miserably.

Now we are living in another era of rapid change. Impending changes may be intelligent, based on all the available facts and grounded on a social insight into the virtues as well as the infirmities of human nature, or they may be a haphazard, unthinking revolt against the existing order. It is for us to choose whether we will follow the example of the leaders of the bench and bar in the Stuart period and in the era of the three revolutions, or surrender to irresponsible change as in the Jacksonian regime. The organized Bar has led the way in formulating the canons of professional and judicial ethics and in policing their enforcement, in promoting sound standards of legal education, of judicial administration and of administrative procedure, in agitating for the exercise by the Federal courts of the rule-making power, in leading the nation in the cause of world organization and of international justice. In all of these activities individuals connected with the law schools have played their part, but the law schools as institutions have merely watched the procession move by.

Law Schools Should Promote Adjustment of Law

Is it not obvious, however, that of all of the branches of the legal profession, the law schools, either singly or collectively, are the best equipped to take the initiative in the fundamental task of promoting the adjustment of the law to the needs of the time? Quite apart from the matters already mentioned, there are many fundamental problems awaiting attention. To mention a few of the great needs of the profession, what lawyer today could assemble the statutory law on a given point in all the States, with any degree of assurance that he was giving his client the service he sought? Or what lawyer could give advice on the administrative regulations and decisions, largely unpublished, of the several States on a given proposition? Or in the Federal Government for that matter? Or even enumerate the Federal administrative agencies, not to mention the State administrative agencies? Can a nation call itself truly civilized when its law cannot be located, much less stated, by experts? Is it not as essential to cut paths and erect sign posts in the forest of statutory law and through the jungle of administrative regulations as it is to know our case law? Is it not a reflection on our legal scholarship as well as on the service rendered by the law schools to the profession and the public that the latest book attempting to present American statutory law as a system is F. J. Stimson's published just sixty years ago? Is it not significant that we have no place to which we may turn for a collation of the provisions of the American State constitutions and their interpretations?

Vital Questions Awaiting Solution

If these undertakings seem too vast for a single law school, there are many vital questions of narrower compass awaiting solution. For instance, after a third of a century's experience with the Federal income tax, is there any sound reason why

the regulations governing its administration should be so complicated in comparison with the English practice? Or that business and individual investment should have to halt every year or so while the Revenue Act is being remade in Congress? Again, according to magazine articles, the President of the United States is finding it impossible to live as our highest elective official must and pay his income tax without running into debt. Many other executives and professional men on whose ability and constructive imagination the economic structure of the country depends are reputed to be suffering the same misfortune. Is this not a subject deserving of scholarly yet practical attention? To state another problem, if one of the purposes of inheritance taxes is to distribute and equalize wealth, is it sound to impose the same tax on an estate where there are half a dozen children among whom the residue is to be divided as on an estate where there is only one child? Other examples of important present-day problems could be multiplied endlessly from almost every branch of the law. One law school has conducted institutes on subjects as varied as the renegotiation and termination of war contracts, employees' pension trusts, a unified transportation system, the legal problems of Bretton Woods and the new Federal Rules of Criminal Procedure.

The Law School of the Future

The law school of the postwar era will necessarily give many graduate courses as part of a nationwide program of post-admission legal education, if the law is to continue to be considered as a learned profession. The law school of the future cannot hope to teach all that a lawyer needs to know in three years. Lawyers must learn to go back to school periodically just as the best physicians and surgeons habitually do. The law school of the future will perforce conduct numerous institutes or conferences for the free discussion of legal topics of contemporary importance and it will publish the proceedings of such gatherings for the benefit of the entire profession. But beyond all that it will be impelled to gather together in a Law Center the most thoughtful and experienced of our judges, legislators, law school professors, social scientists and especially business men from all walks of life, representing industry, labor and the ordinary citizen and put them to work around a conference table where they can bring their varied experience and mature judgment to the solution of vital legal problems in the public interest.

This is the method we have traditionally employed in our constitutional conventions. The most successful of our judicial councils, notably New York and Texas, attribute much of their achievements to their lay members. Lord Mansfield habitually consulted business men on questions of the law merchant; some of them, according to Lord Campbell, became almost professional jurors in his court. The Advisory Committees of the United States Supreme Court which drafted the Federal Rules of Civil and Criminal Procedure owe much of their success to the variety of the experience, both professional and geographic, of their members.

Value of Work Enhanced by Scrutiny of Competent Critics

The value of the results to be obtained from such round-table proceedings will be greatly enhanced by submitting their work to the scrutiny of a wide circle of competent critics. All wisdom is not to be found in any one group, no matter how carefully selected. The American Law Institute in preparing its restatements of the Law distributed tentative drafts prepared by experts to all of the members of the Institute for criticism. Much correspondence ensued and then each section of the Restatements was discussed in an annual meeting open to the entire membership of the Institute. The Advisory Committees of the Supreme Court that drafted the new Federal rules of procedure not only submitted their tentative drafts to the bench and Bar but caused committees to be formed in every Federal district and by every important bar association not only to criticize the proposed drafts but to submit suggestions in advance of the preparation of the rules. The process of consultation of interested parties is being increasingly employed by the Federal administrative agencies in the formulation of regulations. The law schools with the aid of bar associations, business organizations and government officials might well work out a definite system of correspondents in the several States to aid them in this work.

The operation of a Law Center will inevitably impose substantial burdens on the law faculties and the men they call to their aid, but it is difficult to see in what other way we can hope to adapt the law to the needs of our changing civilization. Our law has developed over the centuries through a variety of methods; —the use of fictions, statutes, and the distinguishing and even the overruling of decisions. The predominant method of the Twentieth Century has been administrative law through the delegation of legislative and judicial power in designated areas to specific agencies. One result of the expansion of administrative law has been its centrifugal effect on the law as a system. The law has tended to separate in as many compartments as there are administrative agencies. To the extent that administrative law has, by statute or judicial decisions, jeopardized the doctrine of the supremacy of law, it has also tended to break down the law as a unified system. To the extent that the law ceases to be a system it is in danger of disintegration.

The only way I know of to bring together and harmonize the discordant elements in the law is the same method of patient study followed by courageous action resorted to in the earlier periods of legal history. The chief difference today is that our task is immeasurably more difficult because of the multiplicity of juris-

dictions with which we have to deal, the vast volume of unexplored law that has grown up "Topsy-like" all around us and our relative ignorance of the machinery of our own government. There is, for example, one agency created by statute which expended in its Army branch alone (I do not happen to have the Navy figures) well over three billion dollars last year, but it is not listed either in the United States Government Manual or the Congressional Directory.

The fact that our task is difficult merely gives point to its importance. There is always the danger in a period when the pace of change in the law is rapid, of resorting to change for the mere sake of change in the hope of escaping the existing order. There is always a danger of swinging from one extreme of the pendulum to the other and in the process of forgetting the controlling lessons of earlier experience. This can best be avoided by struggling to obtain a meeting of the minds of intelligent, well informed and sympathetic experts with wide varieties of experience. The law schools can provide the ideal auspices for the meeting of such groups.

Law-Center Should Have Vitalizing Effect

On the other hand, such an experiment as a Law Center while serving the national interest would have a vitalizing effect on legal education such as it has not known since Dean Langdell put his students to reading cases rather than some author's commentary on them. It would bring the law teachers in touch with reality at an unusually high intellectual level. It would quicken the interest of the legal profession in government, for many of the problems to be discussed in the Law Center will inescapably involve government. And as a rekindled interest in government is transferred to the classroom, it will stimulate the profession to a renewed sense of responsibility for its function of formulating and moulding public opinion. It will force attention on the major problems of democratic government in an age of technology, such as the tendency toward government by appointed experts (either real or *ex officio*) instead of by elected officials and the drift toward government by opinion polls rather than by reason and knowledge of the facts. It will drive us constantly toward a concrete study of the fundamental problem of all government—the relation of the State to the welfare of the individual. It will make the study of the law something more than a discussion of technical rules. It will change the modern law school from an institution which merely teaches what the law is and was, and perhaps may be, to a Law Center which is actively participating in the very complicated and highly technical but socially important task of wisely adapting our law, old and new, to the carefully considered needs of a democratic community in the Twentieth Century.

The Historian and the Lawyer

by Ben W. Palmer

OF THE MINNEAPOLIS BAR; LECTURER AT THE UNIVERSITY OF MINNESOTA

The gift of history lies not in historical learning, but in historical thinking—Acton.

Lawyers and historians face common problems: The analysis of documents and of evidence, the choice and arrangement of materials to make a convincing case. The lawyer's purpose is frankly partisan; the historian's, professedly impartial. But the layman, whether juror or reader of history, may be sceptical or unconvinced.

Clio, the muse of history, has always been doubted or assailed. She has never been uninterruptedly adored with unquestioning faith as infallible and divine.

Strumpet she has been called. For Milton she was perverse iniquity; for Spencer, the Newgate Calendar of Nations; for Nietzsche, the frightful rule of folly and chance. Gentle Elia said all true history is full of scandal. And even Gibbon, referring to the lady to whom he devoted his life and owed his fame, said: "History is little more than the register of the crimes, follies and misfortunes of mankind." Seneca asked: "Does it serve any useful purpose to know that Pompey was the first to exhibit the slaughter of eighteen elephants in the circus?" And Voltaire's lady friend echoed the Roman moralist's query: "What does it matter to me, a Frenchwoman living on my estate, to know that Egil succeeded Haquin in Sweden, and that Ottoman was the son of Ortogrul?" So she renounced a study which "overwhelms the mind without illuminating it." And it was Voltaire who said that history is nothing but a parcel of tricks we play the dead.

But the Frenchwoman is not alone. For many a profound mind after a lifetime of study has abandoned in despair the attempt to find a clue through the mazes of the past. "Is history after all," they ask, "but a vast phantasmagoria of meaningless shadow-shapes that may delight the eye, evoke a passing interest, afford momentary escape from this too-pressing present, but leave no permanent reward? Where is the significance, what the value, in a half-caught battle cry from the far-off plains of windy Troy, a conjectured thought of Augustus or Napoleon, some dream-spun theory about the rise and fall of Empires? When will Caesar cross the Rubicon again, or statesmen of this century walk in the identical footsteps of the illustrious dead? And where are those footprints in the shifting sands that have buried many a sphinx and left its riddle without an answer?"

So Henry Adams, distinguished historian, president of the American Historical Association, unbuoyed by Bousset's belief that history is the long and solemn vindication of the mysterious purposes of God, gave up the quest. And James Truslow Adams says: "I believe Henry's insistence upon the fact that history is a chaos, and not a science, unless its phenomena are capable of being arranged under laws, or modes of behaviour that permit of predicting both the direction and the velocity of change of society, is unassailable."

Have Laymen Expected Too Much of History?

But is not this, in part, the trouble? Has not the layman expected far too much from history? In 1566 Bodin published a book entitled: *A Method for the Easy Understanding of History*. But this could not foretell the future. Indeed, the passion for parallels has been the ruin of many a cyclic historian as well as history-studying statesman. For even Thucydides, whose purpose was to write a manual for future statesmen, knew that history was no facile crystal-ball. He knew that no two situations can ever be identical, and that at most the record of the past is helpful only by analogy. In Bolingbroke's phrase, it may be philosophy teaching by example, but the student profits not unless he knows how to pick and use examples, modifying them to suit the variances between the present and the past.

Unreliable Characteristics of Historical Evidence

But the principal charge against history is hypocrisy. As long ago as 700 B.C. the Greeks attempted distinction between fact and fiction by analysis of historical evidence. And from Herodotus down to the present day all historians have professed to tell the truth. Says Tacitus, for example: "I must hold it inconsistent with the dignity of the work I have undertaken to collect fabulous tales and to delight my readers with fictitious stories." But, though forgeries be as relatively scarce as perjurers in court, many an historian, like a present-day witness, has been an innocent liar.

Before we consider the historian, however, let us look first at his materials. What is it that he has to work with?

After all he must build his edifice out of the chance residuum of oblivion's flood—an earth-preserved artifact, the remains of an ancient wall, the torso of some forgotten god, a manuscript blown on some lucky gust of wind into a library-haven against the hazards of fire and malice. Abhorring a vacuum, fearing *lacunae* as indicative of incompetence or spoiling a smoothly-flowing narrative, is it any wonder that many an historian, like Cuvier, would reconstruct the entire creature from a single fossil bone? Would he not give us Heidelberg or Piltdown man from a piece of brain-pan or of thigh-bone, the economic, political and social framework of an extinct society and the secret thoughts of its people? By such a process what a picture may some future historian give of this beloved America of ours on the basis of the driftwood, the flotsam and jetsam of the flood: The plank of a party platform, the 'whereas' of a pressure-group's resolution or of a legislative Act, the diary of a Hollywood actress on her sixteenth trip to Reno, and of all the speeches, only two—one by Gerald K. Smith and one by Hitler frothing at the mouth?

Documents Are Often Self-Serving or Biased

But assuming that he has the materials, how does the historian use them? Few, perhaps, yielded to such a plea as Cicero made to Lucceius. Avid of after-fame, the great Roman asked his friend to weave the story of his achievements into the general context of the history. Better yet would be to detach it from the narrative and give the orator a drama of his own. "So I frankly ask you again and again to eulogize my actions with even more warmth than perhaps you feel, and in that respect to disregard the canons of history . . . I ask you of your bounty to bestow on our love even a little more than may be allowed by truth."

Court historians have written for money or for place, flattering some Augustus of their era; others have fawned upon the mob, studying their fickle tastes to become the best-sellers of a transient day. Many have written for the market, since few have had the mines of Thucydides or the means of James Ford Rhodes. But most historians who distorted truth were, like some of their witnesses and ours, innocent liars, victims of their unknown prejudices or of the difficulties inherent in the search for truth. For we will not verge in the direction of that learned lunatic of the 17th Century who argued skillfully that all the classics, both Greek and Latin, were mediaeval forgeries.

Historians Lack the Chance to Cross Examine Witnesses

The expressed ideal of Tacitus is famous: To write without anger and without partiality. And yet a great modern historian concurs in the judgment of Napoleon upon the Latin: "I know of no other historian who has so calumniated and belittled mankind as he. In the simplest transactions he seeks for criminal motives; out of every emperor he fashions a complete villian." So Ferrero writes: "The Tiberius of Tacitus and Suetonius is a fantastic personality invented by party hatred." And it was to the tug of unrealized bias upon the historian that reference was made in the statement about Taine: That the document did not speak to him, but he to the document.

The historian is, of course, deprived of one of the most effective instruments in the search for truth: Cross-examination. He can only circumstantially and indirectly determine whether the witness speaks of his own knowledge. That which is most positively asserted may be based on hearsay many times removed, and distorted in conveyance by ambiguities of speech and inaccuracies of hearing and of recollection. Or what is apparently a statement of fact may be in the eyes of Omniscience but the capsheaf of a structure composed of unwarranted inferences supported by supposition and conjecture. Certainly lawyers know the perils of conclusions by the witness.

Historians and Lawyers Need to Question Their Witnesses

And here the historian, like the lawyer, has questions about the witness to which he would like the answers: Was the witness where he could see or hear? Was he paying attention? Did he have motive to note and to remember? Was he hard of hearing, of defective vision or color-blind? Were his powers of observation and recollection, perhaps unknown to himself, distorted by emotion or self-interest? Were words spoken in impulsive truth as part of the *res gestae* or after opportunity to weigh the consequences or be influenced by others? Sometimes, of course, especially if against the interest or natural bias of the witness, the words spoken after a time may even be more truthful. And then there is the question of retentiveness and accuracy of memory. Finally we may ask: Does the witness possess adequate ability to convey to us in words that which still remains upon the tablets of his memory?

Thucydides himself remarked: "The truth was hard to discover because reports of the same event by different witnesses were not identical but varied with the observer's memory or bias." And what if the words of only a single witness have survived the wrack of time?

Historian and Lawyer Make Like Choices of Materials

We may, of course, sometimes get the "exact words", especially if the historic fact in question be the document itself. But wrestling with the Scriptures or with constitution, statute or decision, makes unnecessary any laboring of the points of difficulty in interpretation of words written or spoken. We need instance only, for example, the long controversy whether *"vel"*, (which joined the phrases "judgment of his peers" and "law of the land" in Magna Carta) meant "and" or "or". And even if we agree upon the properly exact meaning of the words according to the usage of the time and place, there is always

the hazard of the malapropian speaker.

But even if we agree upon the meaning of the document, there still remains for historian as well as for lawyer the question of choice. Each, having analyzed the evidence, must begin by deciding what facts or materials will best serve his purpose. The historian must be more than a copyist. For his work will be neither readable nor intelligible nor of any value if it is merely an *omnium gatherum* of everything that has happened in the past or in a given period. And the historian must have a purpose, or dominant purpose, and a point of view. It is the values shaped by these that give him canons of selection and rejection.

For centuries history was regarded as a branch of literature. Schiller, dramatist and poet, wrote of the Thirty Years' War. In England we had histories by Hume, a metaphysician, Goldsmith, a playwright, Smollet, a novelist, and a history of Ireland by the poet Tom Moore. And the enormous sale and intensity of impression of Macaulay and Carlyle were due primarily to their literary skills.

The drum-and-trumpet historian tended to work only with the brightest primary colors. Highlights dramatically revealed bloody conflicts of captains and of kings, the pomp and pageantry, the march and countermarch of bannered hosts, the din and tumult of their arms. Unrevealed or in Rembrandtesque chiaroscuro darkness were millioned masses, the unvocal, the seamstress in her garret, the peasant, the Man with the Hoe. It was this type of history that was referred to in the phrase "happy the nation that has no history." It was the clamor of armed conflict therein portrayed that Gallatin must have had in mind when, in a note to Jefferson on the latter's inaugural message, he said he hoped that the latter's administration would "afford but few materials for historians."

Society and Law as a Whole Needed Study

Comte, founder of sociology, had criticized earlier historians for their too great concentration on the dramatic and the colorful wars, political controversies among great leaders, anecdotage about the highly placed or noble born. He had advocated study of society as a whole. He believed that among all peoples a mass *psyche* underlay the *mores* of the group. And then came the modern scientific historical school in Germany, and Acton, great founder of the Cambridge Modern History. He it was who said that the historian must learn to take his meals in the kitchen.

Fortunately there were historians who did not resent this as Beethoven did. Green wrote his history of the English people, MacMaster of the American. Here was something more than gauntleted arena and the warring steed with his neck clothed with thunder. Here was fibre and tissue of the everyday life of men. Just as museums were to display normal flora and fauna, so the cabinet of history was to be something more than a collection of abnormalities and monstrosities. And MacMaster went beyond the formal historical documents, such as public speeches, constitutions, statutes, the resolutions of public bodies. He drew life from *ephemera* such as newspapers and controversial pamphlets. And these were important because of the fact that the publicly declared motives for action or conduct are often not the real ones, as sometimes even the actors themselves well know. And in the history of human thought falsehoods themselves are often elements of important truth. For the historian, like all those who deal successfully with men, knows that what moves them is not the truth, but what they believe to be true. This is the mainspring of their action.

Newly Discovered Evidence Aids History

With the newer scientific spirit and more intensive research we have been so flooded with newly discovered evidence that much of our history has to be rewritten. So it is that within the last fifty years nearly all the histories written in the nineteenth century have become obsolete or obsolescent.

Like the discovery of the Unfinished Symphony, of the words of Aristotle in palimpsest by modern chemistry or an old master under modern paint and varnish by means of ultra violet rays, new materials constantly appear. Aristotle's Constitution of Athens was not discovered until 1891. One of the manuscripts of Tacitus came to light in a small Italian town in 1903. Boswell's secret diaries and letters were unknown until 1927. The more intimate letters of the Brownings were not made public until 1935. Until 1938 more than 2000 of Emerson's letters had not been published. The first edition of the *Ten Thousand Letters of Dickens* was not printed until 1939. Only a few years ago a contemporaneous account of the speech of one "P. Henery," the "Liberty or Death" speech in the Virginia House of Burgesses, was found in the diary of a Frenchman in the office of the Ministry of Marine. And the remarkable Brady photographs of the Civil War were not discovered in a farmhouse attic until nearly half a century after they were taken.

Many Historical Concepts Are Changed by Research and Study

The newer sciences have assisted history and also made necessary its rewriting. Throughout the last century there was incredulity as to Troy's existence. But the spade of the archeologist revealed a fortress on the traditional site of Troy and revivified a Homer whose existence and story many had denied. Economics, sociology, psychology, particularly crowd psychology, all played their part. And even the economic determinist whose inspiration was Marx made revision necessary. Thorold Rogers, the Webbs and Hammonds in England, Rostovtzeff and Ferrero

in Roman history, and the Beards in America, are illustrative.

What are some of the results?

We admit the genuineness of Cicero's orations, denied for 150 years; we see that Livy wrote to immortalize the old aristocracy; that Caesar's Gallic War was a popular work of consummate art designed to conceal a defeat, repair his reputation, fortify his position at Rome. The picture of Alexander the Great as the spoilt child of fortune is a caricature based on propaganda of the day put out by his enemies but accepted as true by historians for many centuries. So also the accepted obscene picture of "The Austrian," Marie Antoinette, was based upon vile lampoons circulated among Parisians by her enemy, the Duc of Orleans. Petrarch has been revealed as the implacable detractor of the Popes at Avignon; Macchiavelli as traducer of the Condottiere. We know now that when Philippi destroyed all hope of a conservative reaction, Sallust did not write with objectivity. Rather he poured forth his rancor in histories intended to display the blunders and disgrace of the conservative party. And in the 18th Century history was used as an arsenal of facts with which to destroy the ancient regime. In the momentous struggle against the Stuarts with their Divine Right of Kings and claims to absolutism, history was wilfully misread by all parties in order to uphold their particular interpretation of the law. No wonder Voltaire wrote that history proves that anything can be proved by history.

Misapprehensions Are Revised by Modern Historiography

We have rediscovered the Middle Ages as a time of steady and fruitful growth rather than the period of static misery portrayed by the rationalism of the 18th Century. Scientists have overturned the three-and-a-half century belief that the English monasteries were suppressed on account of the crimes and immoralities of their inmates. Reform was needed, but no reputable modern historian respects the old accusations based upon contemporary defamations that were merely a step toward the confiscation of their endowments. And we see now the Black Death and the Hundred Years' War as among the causes of the Reformation, though of course not the only ones. We no longer dismiss the Eastern Empire with a paragraphic sneer. We say instead that "for over a thousand years, from the end of the fourth century to the middle of the fifteenth, the Byzantine Empire was the center of a civilization equal to that of any age in brilliancy . . . possibly even the only real civilization which prevailed in Europe between the close of the fifth century and the beginning of the eleventh."

Mirabeau is no longer the incorrupt champion of the French people against the King. The fall of the Bastille was only symbolical, though of profound significance. Many of the women who moved us to pity as described by Carlyle in his lurid description of the March on Versailles for bread were harridans from the social sewers of Paris. Many of them were rouged and petticoated men arranged for by revolutionary agitators. And when the tocsin from the city hall rang out wildly on the hot evening of July 14, 1789, it was not, according to Madelin, intended to summon the people to revolution. Rather was it a wild cry for protection against rumored destruction of property by bands of thieves said to be converging upon the city. And the national guard in its origin was not designed as an instrument of revolution but as protection to the *bourgeoisie.*

Our Concepts of Changes in American History

In American history the changes have been most noticeable. Charles Francis Adams shocked ancestor-worshipping New Englanders with his picture of Puritan bigotry. What Fiske called "the tyranny of Andros," James Truslow Adams calls "an experiment in administration." No longer do we accept as sober historic truth the polemical denunciation of George III, in the Declaration, as a bloody tyrant "guilty of cruelty and perfidy scarcely paralleled in the most barbarous ages." Nor do we see the American Revolution a great forensic controversy over abstract governmental rights, unaffected by economic motives and carried on by a unanimous people without stimulation of propaganda or of revolutionary strategy and leadership. We no longer apply to those who opposed the Revolution the malodorous epithet, "Tories." They have now become the "Loyalists." And can we call the Boston Massacre a "massacre" when the mob assaulted the Redcoats with sticks and stones before one who was knocked down by a club fired his musket? Preston had given no order. And the right of Parliament to impose the Stamp Tax is now generally conceded.

For half a century historians accepted as history the "conspiracy" theory of slave-holders and annexationists, the Whig view of Texas and the Mexican War and the words of partisan debaters in Congress. The "conspiracy" theory was foisted on John Quincy Adams. by Benjamin Lundy, whose "violence of language was matched by the inaccuracy of his knowledge." And a changed historical point of view is implicit in the successive references to the War of 1861-1865 as "The Great Conspiracy," "The Great Rebellion," "The Civil War," "The War between the States" and even, finally by one historian, "The War for Southern Independence."

Unlike the historian, the lawyer does not have the time or occasion, in his daily work before juries or in his appellate briefs, to rewrite his version of the facts in the light of changing social viewpoints. But he must rewrite like other historians, when he is writing legal history. And he must bring to his study of legal institutions, whether for antiquarian interest or purposes of reform, an

appreciation of changing historical points of view. And certainly he must understand his indebtedness to the historian.

Lawyers Know that the Past Influences the Future

For the informed lawyers know that the dead past will not bury its dead. As Galsworthy says: "The persistence of the Past is one of those tragicomic blessings which each new age denies, coming cocksure on to the stage to mouth its claim to a perfect novelty." Especially is this true of democracies, which are proverbially contemptuous of the past.

No Statute of Mortmain can release us from dead hands. Condorcet referred to the partnership of dead and living in a sentence which Morley calls one of the most memorable sentences in the history of thought: "All the ages are linked together by a succession of causes and effects which bind the state of the world to all the states that have gone before." So also it is Burke's conception of society as a living organism whose character is determined and unified by its history, that is his supreme claim to greatness as a political thinker. It is from him that many have derived an appreciation of the value of history and a sense of intimate concern with the vicissitudes of the race. For we carry previous generations in our chromosomes, as conveyors of the social heritage.

A More Direct Transition to the Law

And here we make a more direct transition to the law.

The Romantic movement that swept over Europe at the beginning of the 19th Century found its earliest and strongest expression in the Germany of Herder and Goethe's Goetz and "storm and stress." This generated a passionate love of the past, which was ministered to by the growth of nationalism largely as a reaction to Napoleon. Herder had stated that law sprang from the spirit of a nation. Then Savigny, influenced also by Burke, became chief founder of the historical school of jurisprudence which dominated the 19th Century as rationalists, as the "law of nature" school ruled the 17th and 18th centuries. The 18th Century had placed its faith in pure reason, and constitutions produced out of new whole cloth were manifold.

Historical jurists regarded law as a means of social control, having its roots in generations of experience. There was Maine with his seminal generalization about progress from status to contract. There were Hegelians, to whom the history of the law represented the gradual unfolding of the idea of freedom. Kent and Story in America gave natural law historical bases. True it is that historical jurisprudence waned at the beginning of this century. And its effects were not all beneficent. For the entrepreneur was to be uncontrolled because of the influence of frontier individualism impatient of restraint, of laissez faire and the school of Adam Smith, of evolutionary doctrines of the struggle for existence and survival of the fittest applied in the field of business under the influence of Herbert Spencer, of the use of the due process clause as a rule of substantive law to invalidate legislation and of the theory of legislative futility. But historical jurisprudence tended to correct the isolation, by analytical jurisprudence, of law from morals and, its tendency to abject subjection to the rule because it was the command of a sovereign—a seedling of totalitarian philosophy harking back to the fiat of a Caesar Augustus and denying a higher law. And historical jurisprudence, often with an ultimate idealism, brought law into a healthy relation with philosophy by considering the ends of law. Furthermore, since law was but one means of social control, the door was opened to the wider horizons and the stimulating vistas of the other social sciences: Sociology, psychology, economics. And since we studied how the law had grown, we were led imperceptibly to notice whether or not it worked. And so came criticism, a salutary pragmatism, the functional or sociological approach, and such statements as that of Holmes: "It is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV."

Lawyers and Historical Jurisprudence

Historical jurisprudence appealed to lawyers because they are, as a rule, traditionally conservative. It would appeal to Burke because, writing in the lurid fires of a Revolution that threatened to leap the Channel, the past could be a brake upon the present, an anchor against revolutionary storm. But a study of legal history, especially by one captivated by the idea of progress or sociological evolution, might well be incentive for change. If the past had changed, why not the present? For there were triumphs of conscious effort in the past. It was not all the leaderless, thoughtless, fatalistic and irresistible tide of peoples moved by mystic mass *psyche*.

"If at one time it seemed likely," wrote Maitland, "that the historical spirit (the spirit which strove to understand the classical jurisprudence of Rome and the *Twelve Tables* and the *Lex Salica* and the law of all ages and climes) was fatalistic and inimical to reform, that time already lies in the past. Today we study the day before yesterday in order that yesterday may not paralyze today, and today may not paralyze tomorrow." And so we find Cardozo saying: "History, in illuminating the past, illuminates the present, illuminates the future." Certainly no one would accuse Holmes—author of the famous phrase "a page of history is worth a volume of logic"—of being enslaved by history.

Certainly the scientist knows that one of the indispensable means of understanding present phenomena, whether rock, gas or organism, is to understand its cause; that is, its history. It was Aristotle who wrote: "He who thus considers things in their first growth and origin, whether a state or anything else, will obtain

the clearest view of them." And since law is both a product of society and a means of social control, no one can fully understand it in its philosophical reaches unless he has sound general ideas as to human purposes and historic causation. Here, for example, was the weakness of De Tocqueville. He attemped to read American institutions without sufficient historical background.

Lawyers Need to Understand Other Nations

It is this background that is condition precedent to an understanding of nations as of individuals. And so the lawyer, if he is to play worthily his part in shaping the future of a revolutionary world, must know correctly other nations. For truth of intercourse depends upon accuracy of knowledge, knowledge not only of what is true, but of what the other fellow, because of his personal history and environment, believes to be true. Does it not make all the difference in the world how we answer questions which only history can answer? What was the guilt of Germany in World War I? Was Germany the product of the Ems telegram, of Bismarck's policy of blood and iron in the footsteps of Frederick the Great? Or was it merely the working out of an age-long plan or process, Hegelian or Divine? Are the English a nation of shopkeepers, mercenary, petty of soul? Did they acquire an empire as a result of centuries of diabolical scheming or rather in successive fits of absent-mindedness? Is Albion "perfidious" or is it that precious stone set in a silver sea, that sceptered isle, that teeming womb of royal kings, that water-walled bulwark of freedom for America and the world? Do we remember only ancient partisan stories of the Hessians, and of "bloody" George III, the *Alabama* and threatened recognition of the Confederacy and English indignation at what they called our hypocrisy before Antietam and Emancipation? Or do we recall gratefully instead John Bright and the distressed cotton workers of Liverpool and Manchester and the Prince Consort softening the Prime Minister's more peremptory letter in the *Trent* affair?

History's Challenging Questions for Americans

And what of others, indeed of ourselves? Was the Constitution a designedly reactionary document in drafting and interpretation? Was our conquest of the continent a great epic of which we should be proud: Bold and virtuous frontiersmen, empire builders, captains of industry? Or was it the sordid rape of mother nature's virgin wealth by robber barons and "malefactors of great wealth"? Was Washington a self-sacrificing patriot, or was he a scheming, unscrupulous plotter for more wealth, faithless to his marriage vows, overgiven to the cup? Was Lincoln the uncompromising zealot of New Orleans who would hit slavery hard regardless of the cost to him, or was his idealism and nobility of character seamed with the politician's compromise and scheming? Was Marshall a great constructive statesman or a Machiavellian old fox who foisted judicial "usurpation" upon an unsuspecting public? Was the Mexican War sheer robbery; the Spanish American War the crusading rescue of the oppressed Cubans by an utterly altruistic people pursuing their "Manifest Destiny"? Or was it Imperialism at its worst, spurred on by Hearst's newspapers?

We leave the answers to you. But the answers are important. And your seeking of the answers is more than the recreational escape that Livy referred to when he wrote that in his history he might avert his gaze from the troubles of the world. For in history we find humility for the sins of our national past, understanding of the weaknesses of other people, the ability to distinguish the lasting from the ephemeral in human affairs, patience with the slow processes of social growth and human understanding, historical thinking that gives detachment, objectivity and poise, sympathy for men and nations moved by what they thought was true, and appreciation of the nameless millions who have given us our social heritage. History may also give us a reasoned optimism, not because of some facile theory of inevitable progress but because of the proved resiliency of man, his ability to rise again and again with unconquerable spirit from the apparent destruction of all his achievements and his hopes.

Awareness of the Past Is Needed for Leadership

And it is this appreciation that can best be shown in action as a result of that awareness of present changes that can come only from the record of the past. Too prone are we to be like the infant in his cradle, unaware of a changing world. Always there will be safeguarding, fence-like cradle sides and our mother's smiling face. Later we say: "At least I will live my life snugly, undisturbed by the tumults and disorders that resound in history's pages. For these changes are geologic in their slowness and will not catch me up." The habitations of our own day, our own tents and igloos on the ice floe, seem as stationary as the Pole itself. And yet there is a ceaseless drift as unperceived without history as the movements of the stars to the naked eye. And we cannot contribute, however humbly, to that vision without which the people perish unless we are aware of the drift and, if possible, can determine its direction. But alas, many of us, whose responsibility cannot be gainsayed, are oblivious of the distant drum.

Trotzky, in that unique history of revolution by a leader of it (what would we not give for one by Robespierre, Danton or Marat), writes of Nicholas II: "To that historic flood which was rolling its billows each day closer to the gates of his palace, the last of the Romanoffs offered only a dumb indifference." In his diary he wrote only prosaic entries bordering on the physiological: "Walked long and killed two crows. Drank tea by daylight." There are

promenades on foot, rides in a boat. "Took a walk in a thin shirt. A storm came up and it was very muggy." Says Trotzky: "The Tsar kept his outlook unchanged through two wars and two revolutions." Like Louis XVI, immersed in the petty, fussing with his locksmithing, Nicholas was oblivious of the cataclysmic changes that were to destroy his world. Both he and Louis Capet went toward the abyss "with the crown pushed down over their eyes."

History Can Help Lawyers to Lead and Guide

It was Holdsworth who pointed out that the lawyers of the Stuart period were able to lead the English people successfully against the Stuarts under the leadership of Coke because they were better educated than the lawyers of the previous centuries. They drew upon their learning to secure weapons from the arsenal of history. As Trevelyan says of the Commons in their struggle against James I with his divine right of kings: "As historians they unearthed a period in English history from the thirteenth to the fifteenth century, when Parliament had controlled the counsels of the Crown; and as lawyers they pleaded statutes of the same period, which forbade the encroachments of royal power in specific matters . . . Thus an antiquarian revival, instituted by several hundred of the most hard-headed men in the country, decided the future of our island." May we not say also, to a considerable extent, the future of America?

The lawyers of Coke's day were not all St. Thomas Mores, but they were not wholly untouched by the newer learning. Their horizons were broader than the scrivener's page or the common law pleading. "They could therefore," as Holdsworth says, "in some degree emancipate their minds from barren technicalities and appreciate the larger changes which were taking place in all spheres of the national life."

So, too, we lawyers of this momentous age may well memorize these words. We may find in history's pages that which will help us greatly to appreciate the larger changes that are taking place in all the world today and to play our part in the leadership the world so sorely needs.

"UN" or "UNO"

In the full text of his first report to the General Assembly of The United Nations (to a greater extent than in the official summary which was given out by the Department of Public Information and is published elsewhere in this issue), Trygve Lie, the forceful lawyer who is the Secretary General of The United Nations, refers repeatedly to The United Nations Organization and the "Organization" of The United Nations.

This has given rise to hope that the use of "UNO" will be restored before the year end. "UN" was adopted by the Department of Public Information because it is shorter and because the Charter refers often to the "United Nations", not the "United Nations Organization", although the word "Organization" is used in many places (*e.g.*, last lines of Preamble; Article 2, subparagraphs 1 and 6; Article 4, subparagraph 1; Article 6; Article 17, subparagraphs 1 and 2; Article 19; Article 23, subparagraph 1, etc.).

"UN" has been objected to, by many newspapers and magazines, as well as by delegates and officers. The urbane Dr. Quo of China, President of the Security Council during a turbulent period, expressed his regret that such a change had been formalized. Senator Vandenberg said that "UN" sounded to him "like a grunt". UNESCO (The United Nations Educational, Scientific and Cultural Organization) has continued the use of "Organization".

Those who have had occasion to write or speak have generally realized that there are two different entities, which "UN" does not distinguish. One is The United Nations, which is the collective group of the member Nations themselves. The other is the "Organization"—the Secretariat, the various "organs" set up by the Charter and their large staffs. "UNO" denotes those who do the work, to carry out the policies and the instructions of The United Nations.

Frankly, the JOURNAL has not liked "UN" and has not used it extensively. Reginald Heber Smith entitled his article: "Hope or Despair as to The UNO" (32 A.B.A.J. 63). For the present, we shall not disregard the wishes of the Press Department of the "UNO".

"D. T. Watson of Counsel"

by William L. Ransom

OF THE NEW YORK BAR

At a time when so many young men are coming back from the war and are re-establishing themselves in law offices or law schools, it seems especially appropriate to place before them, and before all of us, the personalities and the careers of great leaders of our profession—men who were faithful to its high standards and were exemplars of its sense of competent workmanship. "Times have changed," it is truly said, and are still changing, and with them the kind of work which the average lawyer is commonly called on to do for clients; but the standards of great industry, painstaking care, mastery of the law of each case dealt with, diligent public service, scrupulous regard for the profession's honor and good repute, and a craftsmanship which forbids doing less than one's best in any task, have not changed with the years and may well be brought unceasingly back to mind, through recalling the men who set those standards and lived up to them.

Ellen Emerson once wrote to Oliver Wendell Holmes, Sr., that everyone wishes to know, from the original sources of intimate knowledge "those conditions of an extraordinary life which it shares with an ordinary life – with their own." It is so among the members of our profession. In declining to give access, in his lifetime, to materials from which a biography of him could be prepared, Elihu Root wrote that such an appraisal of a lawyer should be undertaken only "after his working life is done and men are far enough withdrawn from the events of his life to get a sensible proportion."

H. G. Wells once said cynically that only England and America have always been "ruled by lawyers." If we admit the impeachment, as to what has taken place in American enterprise, industry, institutions of freedom, and opportunities for the individual life, it may be well to search for the qualities which have made for the leadership of lawyers. England and America, however ruled, have produced Magna Carta, the Bill of Rights, the Declaration of Independence, the Constitution of the United States, the Anglo-Saxon common law, the ideals and practice of human rights and impartial justice. England and America have played heroic parts in the winning of two World Wars, and lawyers have had high place in the leadership for victory as well as in the tasks of peace. In their work for clients and the public, their guidance of public opinion, and their service in public office, lawyers have at all times helped to shape, defend and conserve American institutions.

DAVID THOMPSON WATSON

Let Us Recall Leaders of Our Profession

For the reasons which I have indicated above, the JOURNAL will publish from time to time appropriate sketches of the lives and careers of some of the many men who have been recognized leaders of our profession in various parts of America, most of them within the memory of men still living. For these reasons also and to assist in starting such a series, I have kept on my desk at home for several months—until I could find time to put something to paper about it—the biography[1] of a man whom I have long regarded as one of the greatest lawyers of his generation, of whom it could be truly said, as Rufus Isaacs said of Edward Carson, that he was "A very Bayard both of the Bar and of public and private life."

So I have taken for the title of this sketch the title of this biography – the designation which, when it appeared on a brief, was the widely heralded hall-mark of truly

1. *D. T. Watson of Counsel.* By Francis R. Harbison. Pittsburgh, Pa.: Davis & Warde. Pages 302.

master workmanship. Perhaps because David T. Watson was "all lawyer and gentleman" and never would let anyone retain or persuade him to be anything else, even his name is unknown to the large majority of present-day members of the Bar.

A Galaxy of the Great

When I came to New York City to practise law, nearly forty years ago, American enterprise was expanding by leaps and bounds, and the country was fortunate in having produced a great generation of lawyers, in many cities, in virtually all parts of the United States. It was a great privilege for a young bag-carrier to see something of many of them in action, and examine critically a great deal more of the products of their skills. To venture to mention a few of them may be unfair to the memory of others, because recollection falters after long years and retains mostly the names of those who, because of chance circumstances, made a lasting impression on the individual who indites such a list.

"There were giants in the earth in those days." In New York, Elihu Root was generally acclaimed as the intellectual leader, but he was preoccupied with the United States as his client. Joseph H. Choate and Austen G. Fox were outstanding in their court-room skills; Francis Lynde Stetson, John W. Simpson, and John F. Dillon, were master craftsmen of corporate organization and draftsmanship; William D. Guthrie, George W. Wickersham, DeLancey Nicoll, and Morgan J. O'Brien, were trusted advisers as to what courts would rule; and a dozen others were known for distinctive talents. Charles Evans Hughes had won fame in the life insurance investigations but was serving his apprenticeship in political affairs as Governor in Albany; his leadership of the Bar came after his resignation from the Supreme Court in 1916.

In the country as a whole, capable lawyers and sagacious counsellors were numerous. Lawrence Maxwell, in Cincinnati, seemed to me to be one of the most skillful anywhere, in arguments on appeal. At that time, Jacob M. Dickinson and Stephen Gregory in Chicago, John Chipman Gray and Moorfield Storey in Boston, Rufus P. Ranney in Cleveland, Frederick Lehman in St. Louis, George Sutherland in Utah, E. H. Farrar in New Orleans, had earned substantial national recognition—I should mention many more.

Eminence of the Pennsylvania Bar

Events had given to Pennsylvania at that time an ascendancy in the development of natural resources, and the resultant struggle for mastery between bold organizers of industry had called for great resourcefulness and soundness and skill on the part of lawyers, both as advisers and as court-room advocates. The great battles for control of oil, steel, banks, and railroads, required and produced a generation of rugged lawyers who laid aside their traditions or habits of leisurely action. They sat at the elbows of Andrew Carnegie, Henry Frick, H. C. Phipps, Wm. K. Vanderbilt, J. P. Morgan, William C. Whitney; they helped to make momentous decisions quickly, for immediate action according to their advice on the law and the facts; and they rushed to court, in epoch-making litigation, to defend or to attack, as the case might be, the maneuvers of the chieftains. The consequences of wrong advice were calamitous, for lawyers and clients.

In a State Bar which included also such fine lawyers as Francis H. Rawle and George Wharton Pepper in Philadelphia, J. Hay Brown in Lancaster, and James H. Reed, Philander C. Knox, Johns McCleave and John Dalzell in Pittsburgh, the two giant figures who towered then above them all were John G. Johnson of Philadelphia and David T. Watson of Pittsburgh—regarded by many as among working lawyers in private practice the leaders of the American Bar.

I vaguely recall that in some localities—perhaps in western Pennsylvania—the leonine Johnson was called "the D. T. Watson of Philadelphia", whereas in eastern Pennsylvania, and in some circles in New York, Watson was called "the John G. Johnson of Pittsburgh." They were great rivals, frequently on opposite sides in great cases, but they held each other in great admiration and respect.

Johnson was better known in America as a whole. He had the greater aptitude and force for arguing many cases well—the legends of his artful advocacy are many. But he seemed to have great, perhaps understandable, difficulty in readjusting his thinking and his advice to the new philosophies which followed in the wake of the *Northern Securities* decision, in which he had crossed swords with D. T. Watson for the Government, and Watson's superior skill in mastering a case and finding the ground on which it could be won had paved the way to victory for the Government.

During at least the first fifteen years of the Twentieth Century, the most formidable name which could be put on a brief in America, it seemed to me, was that which Mr. Harbison aptly chose as title for his biography: *D. T. Watson of Counsel.*

"No. 66 St. Nicholas Building"

During my early years in New York, it seemed to me—others may have thought differently—that the best-known law office was not in New York but in Pittsburgh, on the sixth floor of the building at the corner of Fourth Avenue and Grant Street, overlooking the Monongahela River. Watson and several other lawyers bought the building in 1892, and it was his professional address until he died at the Hotel Traymore in Atlantic City in 1916.

In his well-lighted corner room with a coal fire, great decisions were made and great briefs were written

—decisions of industrial maneuvers which reverberated throughout the land, briefs which led to judicial rulings of far-reaching consequence. To this room came the wealthy, the bold, the powerful, from many cities. These men needed sagacious counsel; they obtained it from lawyers who were trained in the codes of law and could maintain them as the bulwarks and boundaries within which vast operations could be initiated, carried forword lawfully, and protected from attacks by strong rivals or by government. "Here troubled men were reassured and departed with the light of battle in their eyes," said Harbison of Watson's office. "Here rash and aggressive men were checked and guided. Here many a scoffer came, lingered awhile, and left with a new respect for the dignity, integrity and righteousness of a great lawyer."

It was an era of which Elihu Root truly said at the time that "about half the practice of a decent lawyer consists in telling would-be clients they are damn fools." Like Root, Watson's genius was largely in devising ways by which clients could lawfully achieve objectives which were acceptable to them or could defeat the plans of others who threatened them and their enterprises.

In this room also, three offers of appointment to the Supreme Court of Pennsylvania were rejected; overtures looking to even higher judicial honors were turned aside; important retainers from the Government of the United States were proffered and usually accepted, and the prodigious preparatory work was done. A lifelong Democrat by choice, Watson held the confidence of leaders of all parties, was in debt to none, and held to his steadfast course as "a lawyer's lawyer", unwilling to make the compromises of public office.

Watson in Action

Watson was not imposing in his physical appearance. He was large and heavy-set, a little less than six feet tall, with high shoulders and a very short neck, so that his large, broad-faced head "seemingly sat on his somewhat stooped shoulders". He seemed to "huddle rather than sit" in a chair, but his blue eyes were penetrating and his understanding was uncanny, so that he gave an impression of intellectual power and honesty of mind, along with unusual mastery of both the motives of men and the niceties of the law applicable to any problem before him.

In a court-room he had a great faculty of becoming *en rapport* with the judges, so that he appeared to be, and I think was, not so much an advocate making a skillful argument, as a trusted counsellor who had delved deeply into the law of the subject, had formed precise and dependable conclusions about it, and felt charged with a solemn duty to impart to the court the full facts as they dependably were and the law as he found it to be. Four-fifths of his might appeared to be derived from having driven his disciplined mind into working harder, probing deeper, and thinking more soundly, than his adversaries, and thereby finding the solid ground on which he could rest his case.

No "Biography in Whitewash"

Harbison has written no "biography in whitewash" of his hero. Edmond Burke complained that the average biographer of a public man "points him as a perfect man, magnifies his perfections and suppresses his imperfections, describes the success of his hero in glowing terms, never once hinting of his failures and blunders". *D. T. Watson of Counsel* is not a portrayal of that kind.

Deservedly, the chronicle of Watson's personal life and professional career has been put in very human terms—his early struggles, his strange involvements with some clients who seemed not at all in his line, his return of some retainers, his disagreements with some clients, his disappointment when Theodore Roosevelt insisted that his own Attorney General (Philander C. Knox) should conduct in the Supreme Court the *Northern Securities* case which Watson had won for the Government in the court below, his correspondence about fees, his relations with Andrew Carnegie, Henry Phipps, and Henry C. Frick—all the vicissitudes of a lawyer's life and work while ascending the heights and living on the mountain-tops. It is a vivid picture of the profession in that era, of the lawyer's relationship to the bold projects of venture capital, and of the wars waged between captains of industry.

Through his advice the Vanderbilts battled their way into Pittsburgh for the New York Central Railroad; Frick and Phipps planned and took the decisive steps which vanquished Carnegie; the "battle of the bridges" over the rivers at Pittsburgh was lost to Elihu Root as Secretary of War; and the Government found the way through his reasoning to resist and break the powerful Morgan-Hill and Harriman-Kuhn-Loeb combinations to control all railroad transportation in America, thereby laying the foundations for the breaking up of the Standard Oil, DuPont Powder, tobacco, sugar and many other trade-restraining combinations. Watson was special counsel for the City of Chicago in its legal battle against its railway companies while Edgar Bronson Tolman was Corporation Counsel. Together they won for the City in the Court below, but political exigencies displaced them both before the case came to the Supreme Court; Harbison quotes (page 250) a letter from Major Tolman as to this development.

The Alaskan Boundary Case

A distinguished chapter in his life was his prodigious but troubled service as special counsel for the United States before the Alaskan Boundary Commission in 1903. The Harbison volume contains the correspondence which gives the details of his difficulties with his gifted colleague, the late Jacob M. Dickinson, of Chicago, and his "altercation", during the oral argument, with Lord Alverstone, the Lord Chief Justice of England, who was a member of the Tribunal. This was due to the fact that Watson insisted on making his argument in

his own time and his own characteristic way.

Watson's research and preparation on the momentous issues in this arbitration were prodigious, and his argument ranks as one of the greatest in legal history. Happily, the intellectual integrity of the Lord Chief Justice led him to see that Watson had demolished the British case presented by Sir Robert C. Finlay, then the Attorney General of England. So Lord Alverstone voted with the American commissioners in support of Watson's contentions, in a case in which the facts and the precedents had been regarded as strongly favoring Canada. A large, rich area was won for his country. For his services in this case his charge was $5,000, a large part of which went to pay for his rental of a house and for his other expenses.

Sketch of Watson's Life

David Thompson Watson was born in the village of Washington, in western Pennsylvania, on January 2, 1844. He came of pioneering stock and was reared in an atmosphere of "austere simplicity and Calvinistic ideologies". His father was a successful lawyer who ranked high at the Bar of Washington County.

The future leader of the Bar was graduated from the Harvard Law School in 1866, and was first admitted to practice in Suffolk County, Massachusetts, but soon returned home to enter his father's law office. He decided, however, to locate in Pittsburgh. His early struggles were of the usual sort; Harbison gives interesting details of Watson's small fees and varied practice, as he worked for a place in the profession. Recognition came slowly but surely; in middle age he was at the top.

In 1885 he became a member of the American Bar Association; he retained his membership and his interest until his death in 1916.

Watson's genius was for work. Stenography and typing were not available to lawyers during his early years at the Bar; for nearly twenty years all legal papers had to be written laboriously by hand. He adopted the new devices in his office about 1891, but continued to write out in full in his own hand all important legal papers before he had them typed. He felt that to dictate to a stenographer led to carelessness and inexactness in formulation of ideas and the use of words.

An Individualist in the Law

He never would organize a modern law office or firm, and he was angry with those who urged him to do it. To have a large organization dependent on corporate retainers seemed to him to violate his concept of the dignity and the individual independence of the profession. "Never be owned by any corporation, any man or any interest," he said. "Always be your own master . . . Adequate compensation for work done is our due, but . . . the other rewards of our profession are just as attractive, and in the end of life more compensatory than the gross returns. You can well have each, and, happily, each is an efficient aid to the other."

Harbison tells of Watson's "idiosyncracies" — some of them developed late in life. He would not have married women employed in his office, "believing their loyalties to their homes and husbands unfitted them for the confidences of lawyers." He would not tolerate the wearing of short sleeves or low-necked dresses by his secretaries; they had hastily to pin their collars up when answering his calls. An invariable rule which he imposed was that a full memorandum should be made immediately of every conference with a woman client.

"Inviolable Rights Are Violated"

The shock and "grief" of Watson's career at the Bar was his defeat in *Powell* v. *Pennsylvania*, 127 U. S. 678. This was not because he had lost a law-suit—he had lost many and won many, as befalls any lawyer who gets the "tough" cases. In this instance he deeply felt that it was his country, its Constitution, and generations of its people, who had lost the case. As Harbison says (page 102): "To him the loss of that case was the rending of the veil which guarded the American Ark of the Covenant . . . When some future Gibbon writes on the fall of the American Commonwealth he will find in the violation of the Bill of Rights the seeds of its decay."

Watson never ceased to lament and resent the outcome in the *Powell* case. He protested it vehemently, in private and in public, the rest of his life. To him "It was the first surrender of the courts of the land to the potent, vociferous and insistent demand of a large group of citizens to subordinate the rights of the inarticulate masses to the group's selfish self-interest." That was in 1886, not 1936 or 1946. He *knew* that his case for Powell was sound and unanswerable, if plain language in the Constitution means anything. Yet a majority of the Court had ruled against him. His sensations of outrage and foreboding for his country were those which many other lawyers have experienced in later years, when their sound arguments against punitive legislation to serve "class" interests were rejected although they could not be answered.

Powell was a merchant in Harrisburg. He was indicted and convicted for "selling imitation butter". The packages were marked "oleomargarine butter". Watson's evidence that the statute was "class legislation" for the dairy interests was excluded. The Supreme Court of Pennsylvania affirmed the conviction (144 Pa. 265), Mr. Justice Gordon dissenting. The Supreme Court of the United States affirmed (127 U. S. 678), Mr. Justice Field writing strongly for the minority.

Watson continued to inveigh against judicial abdication of the constitutional duty of the courts to invalidate "class legislation" passed in the guise of "public regulation", or "commerce regulation", on false grounds and with false titles. "Never forget that it is individual cases of violated constitutional rights," he said, "which make the aggregate of successful usurpation of power." To a singular degree, he never forgave

himself for having failed to stem what proved soon to be a rising tide which overran all bounds. Harbison says (page 111) that in his loss of the oleomargarine cases "he had a feeling that he had failed in some measure to meet his destiny".

Watson and "the Blackbirds"

One of the beloved seniors of the American Bar, who was associated with him in the preparation and argument of one of the famous cases of Watson's later years, told me recently that during their work together he formed the impression, which he still has, that Watson was one of the greatest lawyers of his generation.

When they had nearly finished their work, Watson said to the group of weary lawyers: "Gentlemen, I want you to meet Mrs. Watson. We shall leave this office tomorrow afternoon at four, and I wish you all to dine with me at my home." The next day, when they left the office, they met a new David T. Watson.

A span of horses drawing a handsome carriage, with a driver and footman, were waiting in front of the building, and took them to the Watson home. Watson then said: "My houseman will take you to your rooms, where you may rest and dress for dinner. In an hour we will meet here. I am following my rule that every afternoon when I return from work, I undress, sleep for nearly an hour, and then dress and have dinner. That practice has prolonged my life and enabled me to overcome a nervous indigestion which was about getting the best of me."

When they went to their rooms, there were cocktails on each man's table. When they came down again, the beautiful and charming Mrs. Watson joined the party. The dinner conversation was relaxed but gay. Immediately after dinner, Watson gave a signal to a butler, who brought in a bird-cage about two feet square, containing "four-and-twenty-blackbirds". When the butler turned a key, they began to sing. Mrs. Watson was said to have looked rather deprecatingly on this performance, but Watson seemed to enjoy it hugely, and so did his guests.

Watson's Religion and Mysticism

A striking paradox was that this most literal and pragmatic of lawyers, most trusted adviser of the adventuring materialists of his generation, was deeply spiritual as Lincoln was, to the extent of being something of a "mystic". Although he did not attend church regularly, he studied the Bible and often discussed it, and treasured and deeply studied an extensive library on the world's religions and on religious subjects.

In the elements of his faith, he was strangely a fundamentalist. That "My mother's religion is good enough for me" was his basic tenet. "His understanding found a supreme being in his God," says his biographer, "and he pictured his belief clearly, repeatedly, and openly before all men. . . . His faith in a future existence was a part of him and floodlighted his personality". The "three great mysteries" about which rage the "questions that countless millions for countless ages have asked", were birth, life and death; "I join with you in the belief that there is a resurrection and a continuous life", he said. Such a lawyer found time to study the constellations, "the stars in their courses", especially the Pleiades, which he could see so well from his front porch at Sunny Hill.

He Sought the Secret of "the Voices"

The "mystical" quality of his ingrained faith was reflected in his fascination with the personality of the sainted Maid of Orleans. He accumulated a large library on the life of Joan of Arc; and he delved, even more deeply than he ever did as to the law of any case for a client, into the nature and explanation of the "voices" to which she attributed the control of her crusade.

Is there something incongruous about the action of this truly great lawyer, in the fact, not chronicled by his biographer, that on his last visit to Europe, he went to Domremy and followed the footsteps of the Maid from her birthplace to the scene of her tragic death in the flames? Such was his pursuit of the secret of the "voices", that he had given himself to similar historical research for many years. He was especially appreciative of what proved to be Mark Twain's life of Joan of Arc, published by Scribner's without disclosure of the author's identity for a long time.

For Dave Watson, his interest in these things of the spirit was no "light hid under a bushel." He spoke of them openly and willingly, and with an eager quest for the exchange of experiences. "He could not disbelieve", says Harbison, "in the verity of this 'something' which inspired an ignorant peasant girl with superior wisdom and a statecraft that inspired the scattered French people and reincarnated a national spirit in them which founded the French Nation."

Justice a Holy Mission

Perhaps the inner spirit of this man had an insight or rare perception which is not given to most mortals. In any event, his faith was a vital part of his outlook on the law and his profession. "Remember justice is one of the characteristics of God", he said. "To serve, as we do, at his altars, we should never forget our holy mission".

Of our profession he declared that "He who follows it in spirit and in truth enters lofty temples and worships before high altars, and administers aid in God's work on this earth. They also are the helpers in the cause of humanity." No one who ever knew David Watson ever was persuaded that there was aught of cant or rote in this avowal of faith.

Death came to him at the age of 72, when he had attained "the reasoned tranquility of the mature mind". He had devoted himself wholly to his profession, as worthy of all his energies. He had never engaged in any business enterprise

(Continued on page 549)

U. S. Senate Assures Acceptance of World Court's Jurisdiction

The long fight waged by the American Bar Association to bring about the acceptance, by the United States, of the jurisdiction of the International Court of Justice as obligatory in its legal disputes with other nations, which have similarly bound themselves, was finally won on August 3, when the Senate passed S. 196, sponsored by Senator Wayne L. Morse, of Oregon, to authorize the filing of an American Declaration under Article 36, sub-division 2, of the Statute of the Court.

The action of the Senate was taken on the last day of the historic 79th Congress. Sixty votes were recorded in favor of the resolution and only two votes against it, the negative votes thus paralleling the votes cast in opposition to the ratification of the United Nations Charter in 1945. The outcome in the Senate had been forecasted when the Senate Committee on Foreign Relations voted unanimously on July 24 to recommend to the Senate the passage of the Morse resolution.

The Senate Committee based its recommendation on the unanimous report of its sub-committee which, at the reiterated request of the American Bar Association and other interested organizations, had been constituted to hold hearings on the Resolution. The sub-committee consisted of Senators Albert Thomas, of Utah, Chairman, Warren Austin, of Vermont, the American Delegate to the Security Council, and Carl Hatch, of New Mexico.

Representation of the Association

Appearing for the Association at the hearing on July 11, were President Willis Smith, Charles W. Tillett of the Association's Special Committee, Chairman Edgar Turlington of the Section of International Law, and John G. Buchanan, of Pittsburgh, whose powerful address in behalf of the Court (32 A.B.A.J. 446-450) had been embodied, in full, in the *Congressional Record*. On July 12, Judge Orie L. Phillips, Senior Judge of the United States Circuit Court of Appeals in Denver, also in behalf of the Association's Committee, of which he is a member, made a further statement in support of the resolution. Those appearing for the Association filed with the sub-committee the full text of the emphatic demand voted unanimously by the House of Delegates on July 2, (32 A.B.A.J. 469, 485) for the earliest possible action to authorize the filing of an American Declaration.

Amendments Suggested by Mr. Dulles

Senator Vandenberg, of Michigan, placed before the Committee a letter which he had received from John Foster Dulles, of New York, whom the sub-committee had invited to attend. The letter suggested verbal amendments of a formal or technical character, to meet situations which might conceivably arise and might not be deemed to be covered by the Resolution as submitted. Chief among these was a provision to deal expressly with a situation where the United States was a party to a legal dispute where some, but not all of the parties to the dispute, had filed a Declaration under Article 36 of the Statute. It was proposed that the United States should be bound only as to disputes to which all of the parties had agreed in advance to accept the Court's jurisdiction and decision.

The fear was expressed at the hearing that the making of textual changes at that late date might preclude the possibility of action before the Senate adjourned and so delay the matter further until the new Congress convenes in January.

Senator Austin and other members of the sub-committee asked the Association's representatives whether the Association favored the authorization of a Declaration by a two-thirds vote of the Senate or by a majority vote of both Houses of the Congress. The sub-committee was informed that the House of Delegates had not lately declared in favor of either method of authorization, as against the other, but had strongly urged action at the earliest possible time. The Association's Committee has been of the opinion that either method of authorization was within constitutional powers.

Amendments in the Senate

When the Morse Resolution came to the floor of the Senate, it was amended in respects which had the approval of Chairman Connally and Senator Vandenberg of the Committee, who were delegates to the San Francisco Conference and are among the American representatives in The United Nations as well as advisers to the Foreign Ministers' Conference in Paris.

Chairman Connally offered one amendment, under which the final determination as to whether or not a legal dispute was international or domestic in character would be left

to the United States, where the United States was affected.

Mr. Connally's amendment was adopted by a vote of 50 to 12, although it was looked on by some Senators as an outright reservation rather than a simple amendment. Senator Connally reminded the Senate that the United States delegation at San Francisco was opposed to compulsory jurisdiction at that time and had left a wide margin of discretion in its acceptance to implement the Statute of the Court.

"The United States," he said, "is the object of envy of many nations of the world and many peoples. Our treasury is most attractive to them. Immigration to our shores is something that they dream of. I do not favor and I shall not vote to make it possible for the International Court of Justice to decide whether a question of immigration to our shores is a domestic question or an international question. It is a domestic question, of course; but they might contend: 'Well, it is international.'

"Do we want the International Court of Justice to render judgment in a case involving the navigation of the Isthmian Canal, the Panama Canal? The Court might say: 'It is an international stream, like the Dardanelles and the commerce of the world passes through it, and problems relating to it are international problems.'

"In the case of the Panama Canal, our treasury bought it, our blood built it, and it is ours by right of construction. We do not propose to submit to the jurisdiction of any tribunal at any time the right to say whether that is a domestic question."

Voting for Chairman Connally's amendment were thirty other Democrats, eighteen Republicans and one Progressive. Opposing it were ten Democrats and two Republicans, including Senators Morse and Guy Cordon, his Oregon colleague.

Senator Vandenberg was sponsor of an amendment under which disputes arising under a multilateral treaty would not come under International Court jurisdiction unless:

All parties to the treaty affected by the decision were also parties to the case before the Court, or

The United States specifically agreed to the jurisdiction where this Government was concerned.

An amendment which would have gone further was rejected by a vote of 48 to 11. Sponsored by Senator Eugene D. Millikin, of Colorado, it would have provided, in effect, that the United States would not accept the jurisdiction of the World Court in disputes where the basic law of the case was not to be found in existing treaties and conventions to which this country was a party, and where there had not been prior agreement as to the applicable principles of international law.

In opening the debate in the Senate, Chairman Thomas of the sub-committee had declared that "no nation with a clear conscience" should "be afraid to take its case before the bar of international justice."

"If The United Nations is to succeed in the long run, the system of power politics which has prevailed in the world must be superseded by a community of nations whose actions are dominated by the higher concepts of law and justice," he said. "And the states of the world must develop confidence and trust in the peaceful methods of settling disputes so ably outlined in the Charter.

"The resolution before us today would contribute greatly toward this end."

Delay Ended by Unanimous Report

The unanimous report of the Senate Committee left doubt only as to whether or not the Resolution could be brought to the stage of action within the few hectic days remaining before adjournment. The Association accordingly made an appeal to President Truman, Dean Acheson, the Acting Secretary of State, and Majority Leader Alben S. Barkley, for Administration support for clearance and a vote. On August 1, the Acting Secretary of State telegraphed Chairman William L. Ransom of the Association's Committee that the "Administration cordially favors prompt passage of Morse Resolution, and Senate leaders are so informed."

Bi-Partisan Sponsors Backed the Association's Stand

The early deposit of the authorized Declaration by the United States will doubtless take place in due course. Although the Resolution was drafted by Senator Morse and bore his name, it had been given distinguished bipartisan sponsorship shown in the footnote in 32 A.B.A.J. 25, 44-45. The full text of his resolution as finally adopted is given below.[1] Senator Morse's address in the Senate last autumn, in support of the World Court, was one of the most notable in the years of effort to accomplish American adherence to the Court.

---

1. *Resolved (two-thirds of the Senators present concurring therein),* That the Senate advise and consent to the deposit by the President of the United States with the Secretary General of the United Nations of a declaration under paragraph 2 of article 36 of the Statute of the International Court of Justice recognizing as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning—

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

Provided, That such declaration should not apply to—

a. disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or

b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States.

Provided further, That such declaration should remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate the declaration.

Murder Is Murder and the Guilty Can Be Punished

By Tappan Gregory

OF THE ILLINOIS BAR; CHAIRMAN OF THE HOUSE OF DELEGATES

Moscow Declaration

On November 1, 1943, there were released to the world these words, by Roosevelt, Churchill and Stalin, agreed upon at their Moscow Conference:

> The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions, which are being perpetrated by the Hitlerite forces in the many countries they have overrun and from which they are now being steadily expelled. The brutalities of Hitlerite domination are no new thing and all the peoples or territories in their grip have suffered from the worst form of government by terror. What is new is that many of these territories are now being redeemed by the advancing armies of the liberating Powers and that in their desperation, the recoiling Hitlerite Huns are redoubling their ruthless cruelties. This is now evidenced with particular clearness by monstrous crimes of the Hitlerites on the territory of the Soviet Union which is being liberated from the Hitlerites, and on French and Italian territory.
>
> Accordingly, the aforesaid three allied Powers, speaking in the interests of the thirty-two (thirty-three) United Nations, hereby solemnly declare and give full warning of their declaration as follows:
>
> At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein. Lists will be compiled in all possible detail from all these countries having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, The Netherlands, Belgium, Luxemburg, France and Italy.

Warning that Murder Is Murder

> Thus, the Germans who take part in wholesale shootings of Italian officers or in the execution of French, Dutch, Belgian or Norwegian hostages or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland or in territories of the Soviet Union which are now being swept clear of the enemy, will know that they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged. Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.
>
> The above declaration is without prejudice to the case of the major criminals, whose offences have no particular geographical localization and who will be punished by the joint decision of the Governments of the Allies.

Mark well the words of that last paragraph.

Again, during the Crimea Conference at Yalta, these same statesmen advised the world, in their statement of February 11, 1945, that they were determined to "bring all war criminals to just and swift punishment."

Over and over again during the years of the war, notice of this sort, formal and informal, was given to the Axis Powers of the inexorable resolution of Britain, Russia and the United States to punish those responsible for all the wickedness and cruelties loosed upon the world.

Agreement of the Nations for a Tribunal

Against this background, negotiations in London culminated in the Agreement of August 8, 1945, signed by Britain, Russia, France and the United States, to which nineteen other nations later adhered.

The preamble of the Agreement restated the substance of the Moscow Declaration as to War Criminals and Article 1 followed in these terms:

> There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of organizations or groups or in both capacities.

Article 2 directed that the constitution, jurisdiction and functions of the Tribunal be those provided in the annexed Charter which was made an integral part of the agreement.

The Control Council consists of the Commanders-in-Chief of the four signatory powers.

The Tribunal consisted of four members, each with an alternate. Up to the end of March each member and each alternate had attended the whole of every session. There is no

Editor's Note: This paper was prepared by Mr. Gregory as the basis for the address which he gave before the Wisconsin Bar Association at Lake Delton, Wisconsin on June 27. His analysis of the legal bases for the indictment and trial is fortified by his observations during his visit to the Nuremberg trial in March and April, with President Willis Smith of the American Bar Association.

reason to doubt that this practice continued throughout the trial.

Jurisdiction Given by the Charter

The second main division of the Charter contains Articles 6 to 13 inclusive. Article 6 is of sufficient importance to be quoted in full. It follows:

> Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries, shall have the power to try and punish persons who, acting in the interest of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
>
> The following acts or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

Individual Responsibility for Stated Crimes

> (a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
>
> (b) War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
>
> (c) Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plans.

Officers and Heads of States Not Immune

Articles 7 and 8 provide that a defendant shall not be free from responsibility merely because a Head of State or responsible official in a Government Department nor because acting pursuant to order of his Government or of a superior, but the fact of acting under orders may be considered in mitigation of punishment.

Provisions follow for declaratory judgments of criminality against organizations and for trial of individuals by any signatory before national, military or occupation courts on the charge of membership in an organization declared criminal by the Tribunal.

Procedure Specified for the Tribunal

Convictions and sentences can only be imposed by the affirmative votes of at least three out of the four members of the Tribunal.

It is required to prevent unreasonable delay and rule out irrelevant issues and is not bound by technical rules of evidence. Articles 19 and 20 provide:

> It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.
>
> The Tribunal may require to be informed of the nature of any evidence before it is offered so that it may rule upon the relevance thereof.

The permanent seat of the Tribunal is in Berlin and the first meetings of its members and of the Chief Prosecutors were held in Berlin as required. Nuremberg was designated as the place for the first trial. It was the only place in Germany that might be made available with comparatively little reconstruction, furnishing adequate office space in the Palace of Justice, a suitable courthouse and proper jail facilities.

Defendants Are Allowed Counsel

The defendants were allowed to select their own counsel, including Nazis, and in default of selection were furnished with counsel. These lawyers were paid by the Control Council on order of the Tribunal. They were messed and billeted by the United States as the host power, and furnished secretarial assistance and office space. The Army assisted them in obtaining witnesses and documents needed as evidence and they were also given translation and mimeographing services.

TAPPAN GREGORY

The judgment of the Tribunal as to the guilt or innocence of any defendant is final and not subject to review. The death penalty may be imposed. Sentences are to be carried out in accordance with the orders of the Control Council, "which may at any time reduce or otherwise alter the sentences, but may not increase the severity thereof."

This Is a Military Tribunal

This is a new tribunal, constituted before the signing of any peace treaty, to try the defendants for acts committed before the tribunal came into existence. It is a military tribunal, and, as such, in the language of Mr. Justice Jackson in his closing argument, "it is a continuation of the war effort of the Allied Nations." It held its sessions in territory occu-

pied by the conquerors of Germany, bound by no civil precedents, creating no new precedents for civil courts. Its jurisdiction and powers are only those bestowed upon it by the appointing authority. It has been appointed and convened by the four sovereignties signatory to the Agreement of August 8. It is governed by the Charter incorporated in that Agreement. Under that Charter it has broad powers in the matter of the character of evidence that may be admitted, broad enough to justify it in admitting affidavits where their subject matter is pertinent and appropriate.

Creation of the Tribunal Was Lawful

The Tribunal was lawfully created. Military commissions and courts martial are quite generally set up for the trial of persons charged with having already committed a crime. It would be quite in order therefore for any of the four Powers signatory to the agreement of August 8, to try any of the Nuremberg defendants before a military commission appointed and convened by it alone.

The Supreme Court of the United States on February 4, 1946, decided the Yamashita case. One of the points raised for the defense in that case was that Yamashita had been denied due process of law when evidence was admitted in the form of affidavits, pursuant to direction contained in the directive under which the Military Court was created by MacArthur. Conceding that this was a question properly before it for review and that under our Constitution due process can be denied no one, alien or citizen, the Supreme Court nevertheless held that MacArthur had not exceeded his powers in his directive and that therefore there had been no denial of due process in the convening of the Court to try Yamashita or in the character of the evidence admitted.

As long as the creation of a military court by any of the four parties to the Agreement of August 8, to try these defendants, is recognized as legal procedure, no vice appears in the joinder of all four in the creation of the single joint International Military Tribunal for like purpose. And we are not without precedent in support of the validity of this action.

Provisions of the Versailles Treaty after World War I

Article 227 of the Versailles Treaty contains these words:

"The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offense against international morality and the sanctity of treaties. . . . The Allied and Associated Powers will address a request to the Government of The Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial." He was to have been tried and, if found guilty, his punishment determined by an international tribunal of five, one each appointed by each of the principal Allies and Associates.

Articles 228 to 230, inclusive, provided for the trial before military tribunals, and the punishment, of Germans "accused of having committed acts in violation of the laws and customs of war", and of those guilty of criminal acts against the Nationals of any of the Allied and Associated Powers. These articles also contained German recognition of the right of the Allied and Associated Powers to try those accused of having committed acts in violation of the laws and customs of war, and undertakings by the German Government to furnish all documents and information considered necessary to insure full knowledge of incriminating acts, discovery of offenders and just appreciation of responsibility.

It may well be that some measure of duress was present in the execution of the Versailles Treaty. That is true of every treaty between victor and vanquished and should not carry much weight or be given too much consideration unless we are prepared to say that there is no such thing as a valid treaty to terminate a war in which victory and defeat resulted.

The refusal of The Netherlands to surrender the Kaiser prevented his trial. But the fact that the rights to create a tribunal and to try him were not exercised, does not negative the existence of those rights.

Tribunal Is of High Ability and Character

In appraising the success of the effort to create an impartial tribunal it is well to remember that to place on this bench only nationals of the United Nations does not constitute a departure of any substance from the current practice in the trial of criminal cases by military commissions or courts martial. It does not follow that the resultant proceedings are biased.

The distinguished members and alternates on the bench brought to bear great intellectual power, fine legal ability, broad experience, high character and single-minded devotion to the task in hand.

The President of the Tribunal was Lord Justice Lawrence of the Court of Appeal in England, his alternate Sir Norman Birkett, King's Bench Division, High Court of Justice. The Soviet was represented by Major General Nikitchenko, Vice-President of the Supreme Court. Colonel Volchcoff was his alternate. Francis Biddle, former Attorney General, sat for the United States, supported by Judge John J. Parker of the Circuit Court of Appeals for the 4th Circuit as alternate. The French member was M. de Vabres and his alternate M. Falco of the Court of Cassation, the highest court in France.

The Appointment of Robert H. Jackson

On the second of May, 1945, President Truman appointed Mr. Justice Robert H. Jackson of our Supreme Court, United States Chief of Counsel for the Prosecution of Axis Criminality.

He collected skilled assistants about him and repaired to London to consult and negotiate with British, French and Russians for the setting up of the Tribunal and other manifold details so necessary to the smooth and fair operation of the machinery of the Nuremberg trial. By his force,

his resourcefulness, his courage and the charm of his personality he contributed mightily to the successful culmination of these negotiations.

On October 18, 1945, the indictments were submitted to the Tribunal in Berlin and presented to the defendants.

There were four counts, charging Conspiracy, Crimes against Peace, War Crimes and Crimes against Humanity.

As a matter of law it would seem quite clear that if crimes were committed it would be criminal to plan and conspire for the commission of those crimes.

Waging of Aggressive War as a Crime

Perhaps the most difficult question or at least the one most extensively and most seriously debated, involved a challenge to the charge that the waging of aggressive war is a crime and that individuals who participate may be punished.

In his admirable report to the President, released by the White House on June 7, 1945, Mr. Justice Jackson thus stated "The Legal Position of the United States":

> The legal position which the United States will maintain, being thus based on the common sense of justice, is relatively simple and nontechnical. We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable.
>
> Doubtless what appeals to men of good will and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war. War necessarily is a calculated series of killings, of destructions of property, of oppressions. Such acts unquestionably would be criminal except that International Law throws a mantle of protection around acts which otherwise would be crimes, when committed in pursuit of legitimate warfare. In this they are distinguished from the same acts in the pursuit of piracy or brigandage which have been considered punishable wherever and by whomever the guilty are caught. But International Law as taught in the Nineteenth and the early part of the Twentieth Century generally declared that war-making was not illegal and is no crime at law. Summarized by a standard authority, its attitude was that "both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal rights." This, however, was a departure from the doctrine taught by Grotius, the father of International Law, that there is a distinction between the just and the unjust war—the war of defense and the war of aggression.

Aggressive War-Making Was Illegal

He added in his observation on International Law:

> By the time the Nazis came to power it was thoroughly established that launching an aggressive war or the institution of war by treachery was illegal and that the defense of legitimate warfare was no longer available to those who engaged in such an enterprise. It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal.

After commenting upon the Geneva Protcol of 1924, the resolution of the Assembly of the League of 1927, the resolution of the Sixth Pan-American Conference of 1928, and the Briand-Kellogg Pact of 1928, he concluded:

> We therefore propose to charge that a war of aggression is a crime, and that modern International Law has abolished the defense that those who incite or wage it are engaged in legitimate business. Thus may the forces of the law be mobilized on the side of peace.

In 1923 a draft of a treaty of mutual assistance was sponsored by the League of Nations. It contained the provision, in Article 1, "that aggressive war is an international crime." Half of the twenty-nine states expressing themselves upon the subject favored this treaty.

The next year, 1924, there was prepared the Protocol for the Pacific Settlement of International Disputes. This was also under the sponsorship of the League of Nations, and was known as the Geneva Protocol. Its preamble contained a provision in which a war of aggression was termed an international crime. It was passed by forty-eight members in the Assembly, not including Germany, which was not then a member, but it never came into force legally.

Germany Joined in Declaring Aggressive War a Crime

Germany, however, did join with Italy, Japan and others in the unanimous adoption by the Assembly of the League of Nations on September 24, 1927, of a declaration concerning Wars of Aggression. In the preamble there appeared the statement "A War of aggression . . . is . . . an international crime."

By the Briand-Kellogg Pact of 1928 it was agreed by the parties, including Germany, that they would renounce war as an instrument of national policy, and that they condemned resort to war for the settlement of international disputes. The language was not specific as to aggressive war, yet the condemnation of the policy of resorting to war means that one who did follow such a policy was to be condemned, and it is almost inconceivable that a party to this treaty could wage an aggressive war without being guilty of the commission of an illegal act which was in fact an international crime.

Questions of Fact as to Any War

As to the determination of the question of whether or not any given war is an aggressive war, that is always a question of fact and must be proved in each particular case before the application of any of the principles under which the Nuremberg defendants were tried. To say that the power to determine the fact may be abused does not successfully deny the validity of the principles and the procedure involved. There can be no satisfactory definition in advance of what constitutes an aggressive war. It is sometimes argued that every nation may determine for itself when it must fight in self-defense and when any given war in which it becomes involved is a defensive war. This principle presupposes a conclusion reached in good faith. But surely no one would have the temerity to say that the Nazis, having wantonly invaded and attempted to destroy Poland, Denmark, Norway, Belgium,

Holland, Luxemburg and the U. S. S. R., and having declared war on the United States, were deciding in good faith that they must go to war to defend themselves and were not guilty of waging aggressive war.

Individuals Not Exempt from Sanctions Against Crimes

Nor are individuals any longer exempt from the application of sanctions for their part in the waging of aggressive war, for aggressive war is no longer beyond the reach of the law, but by international agreement and resolution among the nations of the world has been recognized as illegal and in fact an international crime. Those who plan and direct and lead in the waging of aggressive war may no longer defend on the ground that their wholesale killings and the wanton destruction and devastation, the tortures and the slavery in which they indulged, are excusable. This their only defense in the past, has now been removed and they stand vulnerable to the charge of having committed acts recognized as crimes by all the civilized nations of the world from time immemorial. From time immemorial too, those who have committed these crimes have been required to stand trial and when found guilty, have been subjected to appropriate punishment. These various crimes are the constituent parts of, and collectively they constitute, aggressive war. Their perpetrators are no better than pirates or brigands or murderers. Those in the dock at Nuremberg were not obeying orders in carrying out the crimes charged against them. They were giving these orders.

Ex Post Facto Laws Not Involved

In the trial of those charged with the waging of aggressive war and the responsibility for that grim offense, and for all its concomitant cruel and ghastly crimes, there was nothing remotely suggestive of the application of *ex post facto* laws. The liability of the defendants to be tried individually, and, if found guilty, punished, is clearly based on the application of sanctions from which they were exempt only as a matter of defense under former principles of international law, but which they can no longer escape, now that international law and their own undertakings have recognized the illegal and criminal character of the waging of aggressive war. And this recognition became an accomplished fact long before the opening of hostilities in the wars for the prosecution of which these defendants were tried in Nuremberg.

The vice of prosecution under *ex post facto* laws is that these laws work a grave injustice and injury upon innocent persons who have acted in good faith, in reliance on the law as it existed when they acted, and whose acts, although later declared to be criminal, when done were not unlawful or immoral. By no stretch of the imagination could any reasonable person look upon the depraved conduct of the Nazis as innocent. It is certain that they did not rely on any possible immunity existing under international law as then in force or generally accepted.

Proofs Against the Nazi Leaders

The proof submitted by the prosecution is mostly in the form of documents carefully prepared by the Nazis themselves—minutes of meetings, verbatim reports of conferences, secret orders, reports, plans projected into the future. Of course, no military leaders were indicted for making plans to be followed in the hypothetical eventuality of war. They were indicted for collaboration and cooperation as political figures in conspiracy with other Nazis in preparation for and participation in the particular wars of aggression which actually did transpire. With conventional German thoroughness and punctilious care the Nazis kept their records, and thousands of documents were captured by the victorious Allies and used in making their *prima facie* case against the Nuremberg defendants.

None of these defendants can escape responsibility on the ground of obedience to Hitler's orders. Without their support he could have given no orders. Moreover, the only orders which subordinates are bound to obey are lawful orders and a reasonable application of this rule will not enmesh in the net any common soldiers in positions entirely without any responsibility, nor will it relieve those who have obeyed illegal orders knowing that these orders were of a character that turned obedience into crime.

Horrors Against Humanity

Among the crimes against the laws of war and humanity charged in the indictments is the persecution by the Germans of minorities in Germany before the start of the war. The right of the Allies to call the Nazis to account for the horrors perpetrated in these persecutions is sometimes called in question. The offenses, according to the Nazis themselves, were part of the necessary prelude to and preparation for their program of expansion, which involved attacks on their neighbors for the purpose of acquiring more territory, and therefore were part of the conspiracy charged in the indictment.

The Responsibility of Organizations

The only remaining charge which has caused some people to be assailed with doubts as to its validity, is that under which it is proposed to seek declaratory judgments of criminality against certain named Nazi organizations to be followed at the option of the Allied Sovereignties involved, by prosecution of individuals for membership in any of these organizations which may have been declared criminal by the International Military Tribunal. These organizations are all essentially of a character in which the membership is voluntary, and as a part of the ritual of joining, each member is required to take an oath to execute promptly and without question the commands of the Nazi leaders. Once an organization is found by the Tribunal to be criminal in character, no good reasons readily suggest themselves why those who

are members should not be to that extent stigmatized, whether or not they are actually brought to trial. Every possible notice is provided for so that individuals may come in and testify in defense of the organization. Let them appear then and establish its innocuous character or pay the penalty for voluntary, knowing participation in its criminal activities. If they are brought to trial, they may defend themselves on the ground that they joined under duress or under fraudulent misrepresentation, even though at such trial they may not again deny the criminal character of the organization if judgment against it has already been entered.

There seems little room for argument as to whether or not the crimes against the laws of war and against humanity, set forth in the indictments, were actually committed. Knowledge is widespread throughout the world, of the murders, tortures, killing of prisoners, killing of hostages, forcing of civilian populations into slave labor and all the grisly excesses practiced upon the inmates of the concentration camps.

Alternatives to Trial by This Tribunal of Justice

Those who criticize the validity of the procedure setting up the Tribunal in Nuremberg and the fundamental justice of the proceedings, fearful that they are based on *ex post facto* laws, or no laws at all, have only three alternatives to suggest. The first is to take the defendants out by executive order and execute them summarily. The second to try them by courts martial or military commissions of the separate sovereignties. The third to turn them loose.

None of these alternatives commends itself. Everything has been done to permit the defendants in the trial at Nuremberg to be heard and to present what they would in their own defense. Nothing was overlooked or left undone which might have contributed to the orderliness and the dignity of the proceedings and to the safeguarding of every law and rule to insure that the defendants were not denied due process of law and to be as certain as humanly possible that there would be no miscarriage of justice.

Mr. Justice Jackson said in his opening statement: "We agree that here they must be given a presumption of innocence, and we accept the burden of proving criminal acts and the responsibility of these defendants for their commission."

Trial According to Justice and Fair Play

On November 20, 1945, the Tribunal convened in the courthouse attached to the Palace of Justice in Nuremberg and the trial began.

For seven weeks the prosecution presented its case. Since the expiration of that period the proceedings have been occupied with the case for the defendants, the summing up by their counsel and the final arguments of the prosecution.

For two weeks we attended every session, heard the completion of the cross-examination of Goering, marked the failure of Hess to take the stand in his own defense, listened to the opening testimony of Ribbentrop, watched the constant play of emotions exhibited in many ways among the defendants, marveled at the patience of the Tribunal, and so, as the picture unfolded, became abundantly convinced that those who advocated that the trial be hurried to a conclusion overlooked the fact that if justice was to be done as had been so firmly resolved by those in authority, and if their power was not to be abused, time enough had to be allowed to insure that no one would be denied his day in court, whether it be a day of minutes or hours, or weeks or months.

"D. T. WATSON OF COUNSEL"

(Continued from page 541)

nor held any public office. His public services as a lawyer were at times outstanding. His objectives did not seem to be material gains from the law, but "the finer rewards which come to him who pursues its ideals and seeks the higher ranges of jurisprudence".

Gone are the generations of "giants" who distinguished and dominated the Bar of America. They have vanished like the era of venture capital and bold enterprise which they served. "There is no chieftain to draw the bow of Ulysses."

In their places now stand lawyers of a different type—less formidable and dogmatic in court-room manner, more flexible, better schooled in what is going on around them, more adaptable to "getting along with government", but withal conscientious, diligent, and actuated by high ideals of the profession and deep regard for the long-run public interest. This may be as well. It is a part of the picture of powers transferred from courts to administrative agencies—the considerable substitution of discretion and executive policy for law and constitutional limitations. It would be difficult to imagine David T. Watson or John G. Johnson before the SEC or a trial examiner of the NLRB.

Evidences are not lacking that in the post-war years the newer generation of lawyers will keep the faith and that the flaming spirit of their predecessors will re-assert itself as occasion arises. It is to be hoped also that they will regain and perpetuate the sense of workmanship, the art in the use of words, the habits of untiring search for the "ought" of the law of a case—not merely a decision "on all fours"—the individualism and independence which made men like David T. Watson outstanding in their devotion to the courts as institutions of justice. The newer generations can learn and retain much from those who have gone before.

The Architecture of the New Administrative Procedure Act

by Honorable John W. Gwynne

MEMBER OF CONGRESS FROM IOWA

Senate Document No. 248, now being printed, is a paper-bound book containing the complete legislative history of the Administrative Procedure Act. Members of the new Section of Administrative Law will receive copies from the Section without charge. Others may order them at 50 cents per copy from the Superintendent of Documents, Government Printing Office, Washington 25, D. C.

A deep feeling for the fundamental processes of justice is a part of every good lawyer and every intelligent citizen. So far as these processes need to be stated at all, he expects to find them in the Constitution of the United States and of his state. It may come as something of a surprise, therefore, to find them written into a statute. Yet that is precisely what has been done to a considerable degree in the new Administrative Procedure Act.

It is the purpose of this article to describe in a few words the basic structure of that legislation, because an understanding of its architecture —so to speak—is the first step to an appreciation of what it is and what it does. There will be nothing here that does not appear from the terms of the Act. But its language is so compressed and lawyers are likely to be so interested in such provisions as those relating to notice, evidence, hearing, and court-review that they may at first overlook the underlying plan of the legislation.

Legislative History

Also, there will be nothing here that does not appear in the very extensive, and intensive, legislative documents which accompany and explain the statute. The legislation was preceded by studies extending back ten years or more (see House Report No. 1980, 79th Congress, pages 7-16). The revisions of the original bill made in the Senate are elaborately explained in the Senate Judiciary Committee Print of June, 1945. The report of the Senate Judiciary Committee sets forth the legislative history, the method of approach of that committee, the structure of the bill, an analysis of the provisions of the bill, and general comments (Senate Report No. 752, 79th Congresss, November 19, 1945). In the discussion on the floor of the Senate last March it was justly characterized as a measure of historic importance, meticulous draftsmanship, and far-reaching effect (see *Congressional Record*, March 12, 1946, pages 2189-2208).

The members of the Committee on the Judiciary of the House of Representatives closely followed the development of the bill in the Senate. The full Committee held hearings in June and July of 1945. Some changes were made in the text of the bill for the purpose of clarifying, emphasizing, and conforming its language and intent (see House Committee Report, pages 49-56). The report of the committee to the House of Representatives was detailed and extensive with respect to the purport, intention, and objectives of the bill (pages 18-48). It was thoroughly explained, discussed and debated on the floor of the House of Representatives on May 24, 1946 (*Congressional Record*, pages 5750-5773).

The writer of this article is the ranking Republican member of the subcommittee of the Committee on the Judiciary of the House of Representatives which there had immediate charge of the bill, S. 7, now the federal Administrative Procedure Act.

Congressman Gwynne has labored long and earnestly in the cause of improving the administration of justice. He was the author and sponsor of H. R. 2602, 79th Congress, entitled the "Fair Government Practices Act" and designed "to improve the relations between private citizens and governmental authority, to facilitate the administration of justice, to protect civil rights, and to preserve the form of government guaranteed by the Constitution of the United States of America" (see Hearings, Committee on the Judiciary, House of Representatives, pages 130 to 137). He has been the spearhead of other or related legislation of major importance.

Now serving his sixth term, Congressman Gwynne had theretofore been a prosecuting attorney and municipal judge in Waterloo, Iowa, where he maintains his residence.

Structure Diagrams

The reports of both Senate and House committees include diagrams of the structure of the legislation (see Senate Committee Report, Figure 2, page 9). The Senate Committee report also contains a short discussion under that heading (pages 7-8), while the House Committee report does much the same in describing the substance of the bill (pages 16-18). With this article there is included the "diagram synopsis of bill omitting detail and secondary exceptions" as it appears in the House Committee report (pages 28-29) except that the paragraph relating to examiners has been shifted from the first column and placed in juxtaposition with the two other sections to which it primarily relates.

Of course this legislation could be diagrammed from various points of view or in various aspects. It has been said that there are really three separate subjects in the legislation—public information, administrative operation, and judicial review *(Congressional Record,* page 5754)—and from that standpoint the diagram might be drawn differently. The subject of administrative procedures might, again, be subdivided into those obtaining in any case (sections 4, 6, and 9) and those applicable in "formal" proceedings where hearings are required (sections 5, 7, 8, and 11). Nevertheless, the diagram reproduced here on page 552 will serve present purposes.

Subjects Covered

Before undertaking to describe the basic distinctions in the Act, it will be helpful to enumerate the different legal subjects or phases of administrative law covered by it without attempting to state the secondary exemptions and qualifications. *First* is the important matter of information. Agencies must state as rules their organization and procedures, make opinions and orders available to public inspection, and permit access to official records (section 3). *Second* are procedural requirements for the exercise of "legislative" and "judicial" functions by administrative agencies (sections 4, 5, 6(a) and (d), and 9(b)) including situations in which hearings are required (sections 7, 8, and 11). *Third* are limitations upon investigatory (section 6(b) and (c)) and other powers (section 9 (a)). *Fourth* are provisions for judicial review in any proper case (section 10).

These subjects might be further divided into provisions respecting the subdelegation of agency functions (see sections 2 (a), 7 (a), and 8 (a)), provisions relating to licensing as compared with other adjudications (see sections 2 (e) and 9 (b) particularly), and provisions relating to personnel as compared with procedures (see sections 7 (a), 8 (a), and 11). But these latter are to be understood only after the more fundamental distinctions and the structure of the Act are well in mind.

Fundamental Distinctions

So far as administrative procedure itself is concerned, there are two fundamental distinctions in the Act. The first is the distinction between the "legislative" and the "judicial" functions of administrative agencies. The second is the distinction between so-called "informal" and "formal" (or statutory hearing) procedures. These differentiations cut across the whole Administrative Procedure Act.

"Legislative" and "Judicial" Functions

The basic differentiation between legislative and judicial functions is stressed both in the Committee reports (Senate, page 7; House, page 17) and in the discussions on the floor of the Senate and House of Representatives *(Congressional Record,* pages 2193, 5754). The definitions are found in subsections 2(c) and 2(d) of the Act. Legislative functions (or "rule making") are those in which an administrative agency issues any form of "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency". Judicial functions (or "adjudications") are all those which result in "the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing."

JOHN W. GWYNNE

These definitions have long been established in the law. *Louisville and Nashville R. R. Co.* v. *Garrett,* 231 U. S. 298; *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210. The most important reason why they are necessary in the present legislation is that, since rules are often of general applicability (like statutes of Congress) while adjudications always relate to named parties (as do decisions of courts), different provisions must be made for such things as notice and public procedure thereafter.

With the import of these definitions firmly established, it will be simpler to understand the separate provisions for "rule making" (that is the "legislative" function) and "adjudication" (that is, the "judicial" function) of administrative agencies. The terms—"rule making" and "adjudication"—are important in section 3 respecting public information

(Continued on page 591)

Diagram Synopsis

of the Administrative Procedure Act

(PUBLIC LAW No. 404, 79th CONGRESS) DETAIL AND SECONDARY EXCEPTIONS OMITTED

GENERAL PROVISIONS

SEC. 1. **Title.**—"Administrative Procedure Act."

SEC. 2. **Definitions.**—Defines (a) agency, excepting representative and war agencies, (b) person and party, (c) rule and rule making, (d) order and adjudication, (e) license and licensing, (f) sanction and relief, (g) agency proceeding and action.

SEC. 3. **Public Information.**—Except secret functions and internal management: (a) agencies are required to publish organization, procedure, and other general rules, (b) opinions and orders are to be published or open to inspection, and (c) official records are to be made available to properly interested persons.

SEC. 6. **Ancillary Matters.**—(a) Parties are entitled to counsel. (b) Investigations are to be confined to authority granted agencies and witnesses are entitled to copies of testimony. (c) Subpenas are to be issued to parties on request and reasonable showing, and are to be judicially enforced if in accordance with law. (d) Written notice and statement of grounds is to be given by agency in denying any request.

SEC. 9. **Sanctions and Powers.**—In exercise of any power or authority: (a) no sanction is to be imposed or rule or order issued save within jurisdiction delegated and authority granted by law, (b) license applications are to be acted upon promptly, revocation is not to be attempted except upon notice and opportunity for the licensee to comply with lawful requirements, and renewals are not to be deemed denied until finally acted upon.

SEC. 12. **Construction and Effect.**—The Act is not to impair other or additional legal rights. Procedure is to apply equally. The usual saving clause is included. Authority is granted to agencies to comply with the Act. Subsequent repeals are to be express. Effective dates are to be deferred and the Act is not to apply to proceedings previously begun.

QUASI-LEGISLATIVE FUNCTIONS

SEC. 4. **Rule Making.**—Except war, foreign affairs, management, and proprietary functions: (a) notice of rule making is to be published in certain instances, (b) thereafter interested persons are to be permitted to make at least written submittals for agency consideration, except that if other statutes require an agency hearing then sections 7 and 8 apply, (c) effective date of rules is to be 30 days following publication, and (d) any interested person may petition for issuance, amendment, or repeal of a rule.

QUASI-JUDICIAL FUNCTIONS

SEC. 5. **Adjudication.**—Where statutes require a hearing: (a) contents of notice are specified, (b) hearings are to be held under sections 7 and 8 to the extent issues cannot first be settled informally, (c) hearing officers are required to operate entirely separate from prosecuting officers and to make or recommend the decision in the case, and (d) agencies are authorized to issue declaratory orders.

SEC. 7. **Hearings.**—In hearings which sections 4 or 5 require to be conducted under this section: (a) presiding officers are to be the agency or its members, examiners, or others specially provided for in other statutes, all to act impartially and be subject to disqualification, (b) presiding officers are to have authority necessary to conduct the hearing and dispose of motions, (c) irrelevant and repetitious evidence is to be excluded as a matter of policy and no sanction is to be imposed or rule or order issued except upon the whole record and as supported by and in accordance with reliable, probative, and substantial evidence, and (d) record of the hearing is to be exclusive for purposes of decision.

SEC. 8. **Decisions.**—Where hearing is required under section 7: (a) examiners are to make either initial decision or recommended decision, as the agency may determine, and (b) prior to any recommended or other decision the parties are entitled to submit suggested findings, exceptions, and supporting reasons and all decisions are to include findings on material issues and a statement of the appropriate action.

SEC. 11. **Examiners.**—Examiners are to be appointed pursuant to Civil Service for proceedings under sections 7 and 8 and may perform no inconsistent duties. They are removable only for good cause determined by Civil Service Commission after hearing, which is subject to judicial review. They are to receive compensation prescribed and adjusted by Civil Service Commission independently of agency recommendations or ratings.

SEC. 10. **Judicial Review.**—Except so far as statutes preclude judicial review or agency action is by law committed to agency discretion: (a) any person suffering legal wrong is entitled to judicial review, (b) the form of action is to be that specially provided by any statute or, in the absence or inadequacy thereof, any appropriate common-law action, (c) every action for which there is no other adequate remedy is made subject to such review, (d) agencies or courts may stay agency action or preserve status or rights pending review, and (e) reviewing courts, upon the whole record and with due regard for the rule of prejudicial error, are to determine all questions of law, compel agency action unlawfully withheld, and hold unlawful action found (1) arbitrary, (2) not in accord with the Constitution, (3) in violation of any statute, (4) without observance of procedure required by law, (5) unsupported by substantial evidence on the record in cases subject to sections 7 and 8, or (6) unwarranted by the facts to extent that facts are subject to trial *de novo* by the reviewing court.

NOTE: Sections 7, 8, and 11 apply only where other statutes require an agency hearing; and section 10 applies in a proper case whether or not an agency hearing is required. Sections 4, 5, 6 (b) and (c), and 9 (b) apply only where agencies by other statutes are given authority to make regulations, adjudicate cases, investigate, issue subpenas, or grant licenses as the case may be. The definitions in section 2 are not operative apart from the rest of the Act.

Full Text of Trygve Lie's Summary of Work of The United Nations

Trygve Lie, the Norwegian lawyer who as Secretary-General of The United Nations has become one of its best known personalities and the No. 1 civil servant of a world at work for peace, has written for the General Assembly of the Organization a 61,000 word "first report." With it he has issued a summary which gives a comprehensive review of the many activities which the Organization has thus far initiated and advanced. The summary also states and faces frankly the obstacles which confront The United Nations and sounds a "clarion call" to the Nations and their peoples to face and overcome the difficulties in a spirit of unity and agreement.

TRYGVE LIE

Because it is the most informative and forthright document which has been issued with the *imprimatur* of The United Nations, its full text is given below in the belief that our readers will find that their reading of it will be well worthwhile, at the time when the General Assembly is coming together for its meeting in New York on September 23.

Frankly stating his belief that The United Nations has yet not succeeded in "capturing the imagination and harnessing the enthusiasm of the peoples of the world" to the extent "that might have been hoped for," he appealed to all of the member Nations and their peoples, especially the five Powers which have a "veto power" in the Security Council, to "ponder the dangers," particularly those resulting from "the lack of mutual trust" and from "the inevitable slowness" of the Organization under such circumstances in coming to an agreement on many matters including procedure, while the world is "in the midst of a giant post-war upheaval." He bluntly reminded that "The United Nations was not designed to perform the functions of a peace conference nor was it equipped to act as a referee between the great powers. It was founded upon the basic assumption that there would be agreement among the permanent members of the Security Council upon major issues."

To this outspoken lawyer, "The fact that the Charter gave a right of veto to each of these permanent members imposes an obligation to seek agreement among themselves. . . . There is no cause for discouragement, still less for pessimism. . . . The United Nations is no stronger than the collective will of the Nations that support it."

The Secretary-General's report was completed as of June 26. He then left for a tour of Europe by plane to consult the heads of states and impress his views upon them, in their home capitols. He went to his own home and capitol in Norway, to Moscow to talk with Joseph Stalin, to Geneva to wind up and take over the properties of the League of Nations, to The Hague to pay his respects to the members of the International Court of Justice, to various capitols en route and finally to Paris to urge the Peace Conference of the Nations to come to an agreement on peace treaties and conclude their deliberations in time to permit the delegates to cross the Atlantic to open the meeting of the General Assembly at the scheduled time on September 23. Evidently Mr. Lie does not intend to "sit on the sidelines" while the work of the Organization suffers and is delayed by the failure of the nations to agree among themselves on the terms of peace treaties to follow the war which ended more than a year ago. "As in the control of atomic power," his summary says, "the choice is between life and death."

Following is the complete text of Secretary General Trygve Lie's summary of the work of the United Nations, which is the introduction to his detailed report, made public on August 1, to be submitted to the General Assembly on September 23:

The idea which first took formal shape at the Moscow Conference in 1944—the idea of a world Organization for the maintenance of peace and security and the promotion of the welfare of humanity built around the war-time union of three peoples in defense of civilization—has become a reality.

At Dumbarton Oaks and Yalta, and finally at the great San Francisco Conference a year ago, the Charter of The United Nations was hammered out. As a result of long and arduous work, detailed plans for the working of the Organization set up under the Charter were then drawn up by the Preparatory Commission and its executive committee. These plans and the programs of work recommended were adopted by the General Assembly at the first part of the first session, held in London in January and February of this year, when the Organization came into effective operation.

This report deals with the first

few months following the close of the London session. The chapters which follow give a detailed account of developments in each of the main fields of the Organization's activities. In this introduction I shall confine myself to a brief summary of work accomplished and of problems and difficulties encountered.

The record of the last few months has been one of intense activity on the part of the Security Council, the Economic and Social Council and their dependent committees and commissions.

The Security Council has held forty-nine meetings since it was established last January and has dealt with six concrete issues relating to the maintenance of peace and security which have been brought before it under Chapter VI of the Charter.

Much of its time has been occupied by questions of procedure. Although preoccupation with such questions was to be expected where the highest issues of policy are involved, other developments in the Security Council's debates present disquieting aspects to which I shall refer below.

Two bodies of vital importance attached to the Security Council—the Military Staff Committee and the Atomic Energy Commission—are actively pursuing their tasks. The Military Staff Committee is preparing the basis for the agreements provided for under Article 47 of the Charter, upon which will rest the system of military enforcement at the disposal of the Security Council. Still more crucial is the work of the Atomic Energy Commission, upon the success of which, indeed, as emphasized by all its members, the entire issue of world peace or world destruction may depend.

Work of the Economic Council

Let me turn now to the work of the Economic and Social Council. While the Security Council and its organs stand guard against threats to the peace, the Economic and Social Council, to quote President Truman, "mobilizes the constructive forces of mankind for the victories of peace."

The five nuclear commissions set up by the Council in February—the Commission on Human Rights (with its Subcommission on the Status of Women), the Economic and Employment Commission, the Temporary Social Commission, the Statistical Commission and the Temporary Transport and Communications Commission—met in April and May and drew up recommendations concerning the permanent organization and the program of work in their respective fields. A special committee on the much-discussed question of the form of the international organization to deal with refugees and displaced persons produced an agreed scheme after two months' consideration.

These various reports formed the basis of the discussions at the second session of the Economic and Social Council lasting from 25 May to 21 June, and decisions were reached on all of them. The terms of reference and the constitution of the permanent technical organs of the Council have been approved. A subcommission to study and report on the conditions and needs of devastated areas has been set up and asked to submit a preliminary report in time for consideration by the General Assembly in September.

At the same session of the Economic and Social Council, draft agreements were negotiated with three of the most important specialized agencies—the International Labor Office, the United Nations Food and Agriculture Organization and the United Nations Educational, Scientific and Cultural Organization—with a view to bringing these agencies into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter.

When these draft agreements come before it, the General Assembly will no doubt wish to examine carefully whether adequate provision has been made for co-ordination in administrative and budgetary matters as well as in regard to the efficient distribution of work and the overall direction of policy.

The World Health Conference, which was called upon the initiative of the Economic and Social Council at its first session in London, is in session at the time of writing and is preparing for the creation of a World Health Organization, the draft constitution of which was prepared by a technical preparatory committee in April.

Because of the special character of its work, the World Health Conference is being attended not only by delegates of the fifty-one United Nations but also by observers from fifteen non-member countries and from the Allied Control Authorities in Germany, Japan and Southern Korea.

Preparations for holding a meeting of the preparatory committee for the International Trade Conference in October are under way. In the same month there will be a meeting of the Commission on Narcotic Drugs, which has taken over the functions of the League's Advisory Committee in this field.

The Trusteeship Council Delayed

Completion of the structure of The United Nations Organization has been delayed by the fact that the Trusteeship Council has not yet been brought into being. I had hoped that some progress toward the organization of this Council might have been achieved by this date through the submission, for consideration by the General Assembly, of trusteeship agreements. This, in fact, has not transpired.

Last February the General Assembly invited states which are administering mandated territories to negotiate, in concert with the other states directly concerned, agreements by means of which the mandated territories would be placed under the trusteeship system, with a view to submitting such agreements for approval preferably not later than during the second part of the General Assembly's first session. I

THE NEW YORK CITY BUILDING, IN FLUSHING MEADOW, NEW YORK, TO BE USED AS AN AUDITORIUM FOR THE MEETING OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS

have reminded the states concerned of this resolution, pointing out that unless agreements can be submitted by that date there may be a delay of another year before the Trusteeship Council can be set up.

On the basis of the common plan approved by the General Assembly in February, and indorsed by the Assembly of the League of Nations in April, detailed arrangements have been made with the Swiss Confederation and with the League authorities concerning the transfer to The United Nations of the League buildings in Geneva and other League assets.

An interim arrangement on privileges and immunities for The United Nations in Switzerland, based upon the general convention approved by the General Assembly, has likewise been concluded.

Acting upon the instructions of the General Assembly and the Economic and Social Council, I have arranged, in agreement with the Secretary General of the League, for the assumption by The United Nations of various functions hitherto performed by the League and for the employment by the United Nations Secretariat of certain categories of experienced League staff.

Title to the League Properties will pass to The United Nations after 31 July, 1946, and decisions will have to be taken by the General Assembly regarding the use to which these properties are to be put. I propose to visit Geneva in July and hope, as a result of this visit, to be in a position to make certain suggestions on this matter. Attention should, moreover, be drawn to the report of the negotiating committee which will be submitted to the Assembly.

The Peace Palace for World Court

Arrangements for obtaining the use of the Peace Palace at The Hague for the International Court of Justice were successfully concluded by the negotiating committee at an early date, and the International Court of Justice held its inaugural meeting there in April.

The task of building up an efficient and truly international secretariat has been immensely complicated by the speed with which the recruitment of staff has had to be accomplished under pressure of the activities described above. It is a task that requires much time for its proper accomplishment. We have had no such respite as the administration of the League of Nations enjoyed in the first months of its existence.

The secretariat of The United Nations now numbers about twelve hundred. It has been organized in accordance with the recommendations of the General Assembly, to cover every phase of the activities of the Organization. It has performed creditably in view of the strain exerted upon it by the multiplicity of the meetings which have been held, the transfer of its working quarters on two occasions, the physical hardships induced by lack of permanent housing and the lack of experience

of a large part of the personnel, recruited from all parts of the world.

Attempts have been made to secure the best possible personnel, but the Organization has not always been able to acquire the services of such people at short notice. While several governments have co-operated by lending skilled staffs, governments have not, in all cases, felt able to release persons whose skilled services were urgently required in the secretariat. Inevitably, it has been impossible as yet to insure a proper balance in the geographical distribution of posts. The painful process of trial and error in working out appropriate administrative patterns has been accentuated by the factors mentioned above.

ADMINISTRATION BUILDING AT THE SPERRY GYROSCOPE COMPANY AT LAKE SUCCESS, NEW YORK, TO BE USED FOR MEETING OF SECURITY COUNCIL OF THE UNITED NATIONS

Every effort is being made to rectify our deficiencies. By the autumn of this year I believe that improvements will be apparent. Within a year a really satisfactory Organization should be in existence. It may be noted that personnel specialists are now on missions in various parts of the world to organize interim machinery for the recruitment of qualified candidates from countries not now represented, or still under-represented, in the secretariat.

New York as Temporary Seat

The move from London to New York, a great city suffering from the most serious housing crisis in its history, was a further source of complication in recruiting and organizing the secretariat and enormously increased the cost of running the organization. Furthermore, in spite of much good will on the part of the officials and private individuals, it has been attended by serious difficulties of an administrative character. With the help of the Federal and municipal authorities, fairly satisfactory temporary accommodation for the secretariat and the main organs of The United Nations was, it is true, found at Hunter College; and complete arrangements have now been made for the move to larger and more suitable quarters at Lake Success in July and August, as well as for the holding of the General Assembly at Flushing in September.

But all this has been accomplished only with the utmost difficulty and at great expense, and serious problems remain in regard to the housing of staff and delegations and in regard to the procurement of supplies. It must be observed, too, that an important question remains unsettled between the organization and the United States authorities, namely, the regime of privileges and immunities, affecting the staff of the Organization. Since this question involves the fiscal position of the members of the secretariat, its solution is a matter of urgency.

While the problems directly affecting the secretariat and the installation of the Organization are naturally of particular concern to me, I also find it desirable to call attention to some broader issues.

The final paragraph of the introduction to the report of the Preparatory Commission reads as follows:

"If by its early actions the new organization can capture the imagination of the world it will surely not belie the expectations of those who see in it the last chance of saving themselves and their children from the scourge of war."

Where do we stand now, six months after these words were written?

Has The United Nations succeeded in capturing the imagination and in harnessing the enthusiasm of the peoples of the world? I, for one, do not feel that it has done so in the degree that might be hoped for. What is the explanation, and what measures can, or should be, taken?

The World in Upheaval

Part of the explanation lies no doubt in the inevitable slowness of United Nations proceedings at this stage, which, in turn, is due to preoccupation with matters of procedure and organization. Much could be done to "educate" public opinion to appreciate more fully the significance of the often undramatic but fun-

damental work that is being performed, and the fact that many of our difficulties are of a temporary character. The world is in the midst of a giant post-war upheaval, its economic life is dislocated, many regions still present a picture of distress and destruction, and many political frontiers and forms of government, as well as the terms of the peace settlement, are still undecided. It is too often overlooked that while such conditions remain the working of the Charter system will inevitably be affected.

In this educative process the secretariat can certainly contribute, and I trust that, with the assistance of members, the work of the public information services may be substantially expanded in the near future. I should wish it to give attention to bringing home the immense promise of the work already accomplished in the economic and social fields, to which public interest has not yet been fully awakened. I should wish it also to correct certain widespread misunderstandings of the Charter and the functions and limitations of the Organization as laid down in that document.

The Veto Power

The United Nations was not designed to perform the functions of a peace conference nor was it equipped to act as a referee between the great powers. If was founded upon the basic assumption that there would be agreement among the permanent members of the Security Council upon major issues.

The fact that the Charter gave the right of veto to each of these permanent members imposes upon them an obligation to seek agreement among themselves. Many of the issues which have come before the Security Council have arisen from inability to reach such agreement.

While The United Nations must take responsibility for its success or failure to fulfill its functions as laid down in the Charter, it cannot properly be held responsible for inability to achieve goals which by the terms of the Charter may not be within its reach.

Agreement Is Needed

I should be failing in my duty, in presenting this report, if I did not emphasize the absolute necessity that the powers should seek agreement among themselves, in a spirit of mutual understanding and a will to compromise, and not abandon their efforts until such agreement has been reached.

Misunderstanding of our problems and discouragement with the results so far achieved may also be attributed, in no small degree, to a lack of historical perspective in surveying the world as we find it today. Without excusing our failure to settle our problems more rapidly, it must be understood that any war on a world scale is bound to bring vast problems in its wake and that many of these problems demand careful and methodical treatment. It is unquestionably better that time be employed in the proper settlement of controversies when hasty agreement could only lead to future trouble.

We may find some source of encouragement and inspiration for the successful settlement of our difficulties by recalling that in certain important respects the international situation in 1919 and 1920 was more serious than it is today. And the very existence of The United Nations is now a factor of inestimable value. If any one doubts this, he has only to ask himself what would now be the state of relationship between peoples and the prospects for the peace of the world if The United Nations were not in being. There is no cause for discouragement, still less for pessimism. But are there not nevertheless very real dangers facing us? Has not the lively desire of all peoples and governments to establish the authority of The United Nations, and to combine their efforts in achieving the victories of peace, sometimes been impeded by a lack of mutual trust among the members of the Organization?

The Collective Will of the Nations

The United Nations is no stronger than the collective will of the nations that support it. Of itself it can do nothing. It is a machinery through which the nations can cooperate. It can be used and developed in the light of its activities and experience, to the untold benefit of humanity, or it can be discarded and broken. As in the control of

(Continued on page 595)

United Nations Week

Public authorities and many national organizations have set the week from September 22 through the 28th as United Nations Week, to help welcome to the United States the distinguished General Assembly of The United Nations, which opens on September 23, its first session on American soil.

The observance of the week will also be an expression of the earnest and militant public opinion of America in support of the accomplishment of peace, justice and law through The United Nations and the World Court.

The notable program of world-wide broadcasts, which the National Broadcasting Company and its cooperating organizations have been conducting during the past month as to The United Nations and their peoples will be brought to culmination during that week. The American Bar Association is one of the cooperating organizations.

Lawyers in their home communities should help along the observance of the week, as schools, clubs, and other organizations will do, with the aid of the radio programs. Local meetings are recommended to discuss the work of The United Nations, in all parts of the country.

Judge Hatton W. Sumners

With the adjournment of the 79th Congress on August 5, the long and distinguished career of Judge Hatton W. Sumners, of Texas, Chairman of the Committee on the Judiciary, came to a close. Several months ago, he announced that he would not be a candidate for re-election from his Dallas district. His term does not expire until the end of the year, but his voice will not be heard or his leadership exerted on the floor of the House again, unless a special session of the Congress is called.

In token of the high esteem in which Judge Sumners is held by the lawyers of America and in tribute to one of the most useful careers any lawyer has had in the Congress, his portrait adorns the cover of this issue.

Tendered an Unprecedented Honor

His life and public services are so well known to our readers that it would be repetitious to recount here many details. They were told in our columns in 1944, when the American Bar Association Medal was bestowed on him in recognition of his conspicuous services to American jurisprudence—an unprecedented award, but significant of the times, in that those services were rendered in Committee work on legislation and on the floor of the House of Representatives. Members of the Association have long been aware of Judge Sumners' great services to American courts and jurisprudence. They have admired and loved him for his rugged devotion to the public interest, which has transcended partisan divisions and differences. They were happy when he received the signal honor which he had so justly earned and which he so warmly appreciated.

His appreciation of the public usefulness of the work of the American Bar Association was chronicled in connection with his appearance before the House of Delegates in Cincinnati last December (32 A.B.A.J. 202). His announcement of his intention to retire from the Congress in order to devote the rest of his life to speaking and working in behalf of the maintenance of government according to the Constitution and the laws, was reported, with regret, in our May issue (32 A.B.A.J. 281).

Judge Sumners was born in Lincoln County, Tennessee, on May 30, 1875. He began the practice of law in Dallas, Texas, in 1897, and he served as prosecuting attorney of Dallas County for two terms. In 1913 he was elected to Congress and has been there ever since.

Committee on the Judiciary, House of Representatives.

A Leader in Accomplishing Constructive Legislation

He rose steadily in leadership and capacity for accomplishing constructive legislation. At the request of Chief Justice William Howard Taft, in 1925, Judge Sumners introduced a bill to allow the Supreme Court wider discretion through the writ of certiorari to decide what cases it would consider. In 1931 he first became the Chairman of the Committee on the Judiciary.

His service in that post has been continuous except for brief periods when his party was in the minority in the House. He has been the author and champion of many vital measures which bear his name, and his devotion to the public interest has repeatedly risen above party. His special concern has been the improvement of the administration of justice and the maintenance of high standards of judicial conduct, so that the people will have grounds for full confidence in the integrity, impartiality and competence of the Courts.

At the time of the Association's fight against the "packing" of the Supreme Court, he was a stalwart and outspoken opponent of that measure. He has fought unceasingly the centralization of "big government," the breaking down and taking away of the powers of the States, the prodigality of federal expenditures, the disregard of constitutional limitations on the powers of the Executive, and the abuses which have arisen in many of the administrative agencies. The culmination of his legislative career was his skillful advocacy of the Association's McCarran-Sumners bill which became law this year as the Administrative Procedure Act. To the closing minutes of the session just ended, he continued his courageous efforts for his convictions. From many members of the Congress, irrespective of party, there were striking demonstrations of affection for him and regret for his leaving the halls of the Congress.

Long a Member of the American Bar

Judge Sumners has been a member of the American Bar Association since 1929, and is a familiar and beloved figure at its meetings. He has often spoken before the Assembly or the House, to ask the Association's help for his legislative measures. He has served for several years on the Association's Committee on Resolutions, and in 1941 and 1942 was its Chairman.

For his eminent services and his lovable qualities he will be long remembered. A host of Americans will wish for him many years of health and strength to continue his efforts to arouse lawyers and other citizens to a realization of their duty to be vigilant and militant in maintaining the fundamentals of republican government, the safeguards of the Constitution and the American ideals of liberty and justice under law. In the Congress he will be missed, but it is a part of the American tradition that new leaders will arise and stand in his place and will earn and receive the gratitude of the people for carrying forward the great causes which this Texas lawyer so far and nobly advanced.

Chairman Sumners presiding.

"Books for Lawyers"

THE LOWELLS AND THEIR SEVEN WORLDS. *By Ferris Greenslet. Boston: Houghton Mifflin Company. September, 1946. $4. Pages 420.*

Some lawyers take an interest in their ancestors. Others find more to enjoy in their children, sometimes even more in their grandchildren. Here is a book in which both can find vicarious satisfaction; but that is not all. There is much that will excite any lawyer, as ungenealogical as you please, even a bachelor. It is an account of the Lowell family from their progenitor Percival who managed the estates of the Earls of Berkeley and who sailed from Bristol to Boston in 1639, down to the Lowells whom some of us have had the good fortune to know ourselves. It is a pageant of "the heart, mind, imagination, animal spirits, and pocket-book of New England." Everyone is interested in one or more of these things, anyhow the way Mr. Greenslet tells them.

The first Lowell in whom a lawyer will take particular professional interest is the first active practicing lawyer in the family. Against the background of his father's Presbyterian – inclining already to Unitarian – sermons, the first John Lowell practiced law in the Newburyport which was growing up to revolution and then in the Boston, which was getting over it. He was legal adviser of the Committee for confiscated Tory estates, and then also, but later, agent for many of the rich Tory emigres. Meanwhile bigger and better fees came in from prize cases, to a total in a few years of some $200,000. It was a good law practice, but John Lowell's career included more than that – the defense of murder cases, the founding of the First National Bank of Boston, membership in the Continental Congress; and it was crowned by his appointment by President Adams to the Circuit Court, one of the "midnight judges." The great case might even have been *Lowell* v. *Madison* instead of *Marbury*, if Marshall had been a little more negligent about delivering commissions. A good practice and a good career, but John Lowell did more than that for himself and his country. He married three times, and he started three different lines of Lowells. The discerning reader is given the opportunity of detecting the differences in the Lowell strain which were introduced by a Higginson, a Cabot, and a Tyng. For Mr. Greenslet follows the three lines down into our own time.

It was another John who was the Higginson scion, and he was a Federalist; that is, one to whom Thomas Jefferson was "that man in the White House." Perhaps this John will interest the lawyer even more than his father, for two episodes in his life. One, of course, will be the Fairbanks murder case in Dedham, in which he and Harrison Gray Otis in the summer of 1801 defended Jason Fairbanks. Barring contemporary accounts, I am not aware of any other place where an account of this stirring and romantic trial for murder is accessible. Jason was charged with the murder of his sweetheart, Betsy Fales, and despite Lowell and Otis he was convicted. Then he broke jail, and there was a tradition that his escape was planned by "a lady of great beauty and much literary reputation, the wife of one already eminent at the Bar, who subsequently rose to its high office. That was the tradition, and Mr. Greenslet adds: "No wife of a Chief Justice of Massachusetts or of the United States seems quite to fit." Who was she? Perhaps some member of the American Bar Association will suggest at least a clue. But even under such auspices Jason was caught and hanged.

The other episode is less romantic, but to prosaic lawyers, if there are any, quite as interesting. John Lowell, after he had retired from practice, was commissioned to go to London to recover an old debt for Nicholas Boylston, which had been owing to Boylston since before the Revolution; and he came home with it, £10,000, and John's fee was £1,600. Moderate enough. Mr. Greenslet tells how he succeeded, and how he beguiled his passage home by writing verses to his niece, with marginal annotations.

It was this John's grandson whose name we lawyers attach to Admiralty and Bankruptcy, yet another John Lowell. As his great-grandfather was one of Adams' last, so he was Lincoln's last appointment to the bench. When his decisions were later separately published, Judge Holmes reviewed them. First Holmes thought that Lowell could "with almost superhuman ingenuity twist his decisions to fit his own ideas of justice," but by the time the second volume came out, Holmes found it "refreshing to read decisions based on fundamental principles of law and justice."

There were two more Lowell judges, both likewise on the United States District Court in Massachusetts, Francis C. Lowell, he who also wrote a life of Joan of Arc, and James A. Lowell, who so far is the last of the Lowells to sit on the bench. The last John many of us happily remember as a member of the Executive Committee of the American Bar Association (1915-1918) and an editor of this JOURNAL (1920-1922). It was his daughter who returned to England in 1924 to marry the Earl of Berkeley whose estates her ancestor Percival had been taking such good care of when he left in 1639.

Professionally-minded lawyers, but certainly no one else, may take less interest in the issue of the first John's Cabot wife and the issue of his last wife, Rebecca Tyng. The Cabot strain produced an earlier Francis C. Lowell, the one who brought the manufacture of cotton from England to America. It was in Francis' capacious head that he carried the technique of the manufacture of cotton cloth from Manchester and Birmingham to Lowell, Massachusetts, and when he got home, his relations told him that he was undertaking "a visionary and dangerous scheme, and thought him mad"; and his wife said, as they sailed up Boston Harbor, with the spindles in her husband's head, that it "was more beautiful than anything I had seen in my absence." Visionary perhaps, but when Francis died at the age of forty-two, as Mr. Greenslet says, "he had done more than any other member of his effective family, more perhaps than any other man, to swell the pocket-book of New England and shape its economic future."

A strictly professional mind may take even less interest in the Tyng line, though it produced James Russell Lowell, the poet, the professor, the ambassador, the author of the Bigelow papers, and indeed, as here you may read among many other things, the godfather of Virginia Woolf. A review in a legal journal is no place to expand on such a celebrity, nor on his gallant nephew, Charles Russell Lowell, the *beau sabreur*, as Mr. Greenslet calls him and proceeds to show how just the epithet is. He was killed in 1864 at the age of twenty-nine; and Custer said, "Had General Lowell lived it is my firm belief that he would have commanded all my cavalry and would have done better with it than I could have done." But had he lived, as Mr. Greenslet asks, what might not have happened? After you have read this chapter, you will not dissent when Mr. Greenslet says: "It is not impossible that either Major McKinley or Colonel Hayes might never have been a tenant of the White House and that Massachusetts would have had a President midway between John Quincy Adams and Calvin Coolidge."

Anyone, lawyer or not, will take more and more delight as this book brings him down nearer to the present time. To many readers the Higginson line bloomed, not in the Federalist lawyer, but in Percival, Guy, Amy, and Lawrence, and here you will find things elsewhere not to be found. There is a chapter on Amy and Guy; Amy's first verses, at the age of nine, the Amy who told her publishers they didn't know a God damned thing about biography, the Amy with whom to argue, Sandburg said, was like arguing "with a big blue wave"; and Guy, the architect of the Federal Courthouse in New York, which was in his original design to be circular instead of the hexagon we know it—how he told the German Emperor, on his yacht, "Only Emperors cut knots; Republicans untie them."

Another chapter, on Percival, shows you other sides than the astronomical – not only the man of Mars and the posthumous discoverer of Pluto, but also the Percy who wrote from Japan about the geisha girls to his friend Frederick J. Stimson.

The last chapter gives us Lawrence Lowell, who, when he took over the Presidency of Harvard, told Bishop Lawrence, it was "the same old ship, on the same old course, only on another tack." Here we can read how President Lowell told the Board of Overseers that if they did not reappoint Laski, his own resignation would be immediately in their hands; and here, too, we have the letter which Bishop Lawrence and a few others wrote to Governor Fuller about the *Sacco-Vanzetti* case, at the suggestion, I may add, of some who doubted the justice of their conviction. Thereby was instigated the Lowell Committee. Compare this letter with the slip of paper that was found in all the magazines in the Boston Athenaeum the next morning after the execution.

"The old churches and the older families still stand," Mr. Greenslet says, "symbols and examples we shall be ill advised to ignore, the enduring core of the living and fruitful past." The motto of the Lowell family is "Occasionem cognosce." "Seize your opportunity," or perhaps more accurately "spot" it. All this review can be is a sort of spot-check of what lawyers and all other readers here have an opportunity to seize.

CHARLES P. CURTIS, JR.

Boston, Massachusetts

ALEXANDER HAMILTON. *By Nathan Schachner. New York: D. Appleton-Century Company, Inc. 1946. Price $4. Pages 488.*

In 1772 an illegitimate, sixteen-year-old lad arrived in New York. He had come from his birthplace in the West Indies by way of Boston; his passage money had been contributed by some of his mother's relatives and by admirers who had been impressed by the promise shown in a newspaper letter he had written describing a hurricane. The boy, when he landed in Boston, had not a single acquaintance in any one of the colonies, although a few letters of introduction were in his pocket.

A few years later, just turned twenty, the young man was a lieutenant colonel in the Continental Army and aide-de-camp to General George Washington. Thereafter there was no man in whom Washington reposed greater confidence or whose advice he more frequently followed.

There were about the gallant officer a Gallic verve and charm which were irresistible to many men and to more women. He was not by choice a desk soldier. At the beginning of the Revolution he had raised a company, and he commanded it in combat until his services were requisitioned by Washington. He never more persistently exerted his influence on his chief than he did to obtain permission to lead a storming party which took a British redoubt in the closing days at Yorktown.

It was no surprise to his friends when this confidant of Washington and boon companion of the Marquis de Lafayette succeeded in marrying into one of the richest of the patroon families of New York State.

Not only did his friends appreciate, but there was forced upon his bitterest enemies full recognition of, his dynamic genius. He was one of the chief planners of the Constitutional Convention. He was a principal collaborator in the production of one of the most brilliant volumes of political propaganda that ever appeared—a volume which was not only instrumental in securing the ratification of the Constitution but which greatly influenced its interpretation. He planned, secured the adoption of and inaugurated our fiscal system. He was a leader of the Bar and the originator and patron saint of a great political party. When war with France threatened he was made second in command of our army.

As kind as was his adopted country to this one of her founders he had many disappointments; as gracious as was his personality and as brilliant as were his talents he had not a few defects of character.

He had a Napoleonic complex and his thirst for military glory was never assuaged. He wanted a government of "the rich and well-born," modeled upon that of Great Britain, and the Constitution was to him "a frail and worthless fabric". He was inordinately ambitious; his ambition was never fully realized. He lived to see his party submerged by the rising tide of democracy and himself bereft of influence.

To his discredit he unnecessarily quarreled with and cast private slurs upon Washington. He was often a politician rather than a statesman. As a cabinet member he meddled in other departments and gave confidential information to the British minister. While he was not guilty of personal peculation he furnished tips to his friends and relatives which enabled them profitably to speculate in the public funds. He was a philanderer and a victim of the badger game; he was forced personally to reveal an intrigue with a married woman in order to escape a more sinister interpretation of his conduct and of letters he had written. He was an unfair and vindictive opponent and a libelous pamphleteer. His gratuitous attacks on Burr furnished the occasion for the duel which resulted in his death at forty-seven.

Such was the contradictory personality, such the meteoric career of Alexander Hamilton.

It was not to be expected that during his lifetime there would be a judicial appraisal of either the character or achievements of such a man. There were few indeed, capable of writing about him, who were not either ardent admirers or implacable enemies. In fact Mr. Schachner's biography is the first thoroughly impartial and entirely adequate study of Hamilton, and it is published almost a century and a half after Hamilton fell. Much, of course, has been written about Hamilton in the meantime; but he had become a party symbol and many of his biographers held to the party line. This was notably true of Henry Cabot Lodge, who with his usual subtle bias championed Hamilton.[1] Claude G. Bowers is more frank but almost equally extreme in building up Jefferson and depreciating Hamilton.[2] There are a number of other less partisan biographies but none quite meets the test of entire accuracy and complete detachment.[3]

Mr. Schachner was no doubt kept on guard against partisanship by the fact that he had previously studied Hamilton from an entirely different viewpoint—by writing the biography of Aaron Burr, whose life strangely paralleled that of Hamilton for many years before they faced one another in the tragic denouement that ended the life of the one and wrecked that of the other.

Mr. Schachner's work is not only judicial in tone, it is factually accurate. The values of sources are carefully assessed and for the first time the author of a biography of Hamilton has thoroughly examined the great mass of the Hamilton Manuscripts in the Library of Congress.

The result of Mr. Schachner's efforts is a thoroughly readable and a completely documented study—one of the best biographies that has appeared in a lustrum. It should be in the running for the Pulitzer Prize. If it cannot be said to be definitive it is only because Mr. Schachner, perhaps for reasons of compression, does not deal at length with some phases of Hamilton's career; he does not, for example, essay the highly controversial task of allocating all the Federalist papers among the three authors.[4]

No biographer of Hamilton has approached Mr. Schachner in the leniency shown Aaron Burr. He explains Hamilton's advocacy of the election of Jefferson instead of Burr not as an instance of disinterested patriotism but as an exhibition of Hamilton's jealousy of his most con-

1. *Alexander Hamilton* (1882) by Henry Cabot Lodge.

2. *Jefferson and Hamilton* (1925) by Claude G. Bowers.

3. J. T. Morse's *Life of Alexander Hamilton* (1876) and F. S. Oliver's *Alexander Hamilton: an Essay in American Union* (1906) are in the same class with Lodge's work. The point of view of Francis W. Hirst's *Life and Letters of Thomas Jefferson* (1926) is virtually the same as that of Bowers. Hamilton's son, John Church Hamilton, published an immense documentary life, *History of the Republic of the U. S. of America as Traced in the Writings of Alexander Hamilton* (6 Vols. 1857-1860). Hamilton's grandson, Allan McLane Hamilton, wrote an extremely interesting *Intimate Life of Alexander Hamilton* (1910). Less partial biographies are W. G. Sumner's *Alexander Hamilton* (1890), James Schouler's *Alexander Hamilton* (1901) and H. J. Ford's *Alexander Hamilton* (1920). Gertrude Atherton based her historical novel about Hamilton, *The Conqueror* (1902), largely upon original research.

4. Mr. Schachner cites the studies of this subject by Henry Cabot Lodge, E. G. Bourne and P. L. Ford, but not the latest and best, *Authorship of the Disputed Federalist Papers* by Douglass Adair, William and Mary Quarterly, Third series, Vol. 1, Nos. 2 and 3. Perhaps this last was published too recently to come to Mr. Schachner's attention in time for use. Cf. American Bar Association Journal, November, 1945, Vol. 31, page 587.

stant rival and of his fear that Burr might supplant him as leader of the Federalist party. Jefferson's election he attributes not to Hamilton's influence but to Burr's refusal to bargain with the Federalists. (pages 393-402). Even as to the duel Mr. Schachner is realistic: "Hamilton should have known that his wide-spread allegations concerning Burr must some day lead exactly where they did. He himself, on several occasions, had offered challenge for equal or lesser provocation." (page 423). Again: "Judge Peters, through a friend of Hamilton, insisted that 'as an old military man Colonel Burr could not have acted otherwise than he did.'" (page 430).

If Mr. Schachner becomes anywhere suspect of bias it is in his treatment of Madison and Jefferson; even here it is a delicate question of emphasis. Personally I do not agree with his implied depreciation of Madison's attainments and achievements. So of Jefferson: moreover, Mr. Schachner seems to me to overstress by repetition Jefferson's disingenuousness in explaining the political bargain between Jefferson and Hamilton pursuant to which the removal of the national capital, first from New York to Philadelphia and then to the District, was the *quid pro quo* for the assumption by the federal government of the state debts. (pages 261-264, 267, 294-295).

With the portrayal of Hamilton I have no quarrel. His charm, his gallantry, his precocity, and, indeed, his ability can hardly be over-emphasized. He was an adroit politician and used this talent to good effect in engineering the convocation of the Constitutional Convention. He was alien born and his first loyalty was not to any state but to the Nation he envisioned.[5] He strongly desired an independent country but one with a unitary government. Probably because of his own origin he cultivated the rich and socially prominent. His powers of comprehensive conception were unrivalled. He was essentially an advocate, and orally and in writing, presented his views with a persuasive cogency that was convincing. He contributed much to the ratification of the Constitution and to the establishment of the government.

He was a perfect foil for Jefferson. Jefferson was to the manor born; he was a Virginian of Virginians and his first loyalty was to his native state. His views were the antithesis of those of Hamilton. He had a familiarity with—bordering on contempt—for wealth and position. He was a reasoned and disinterested democrat.

The nascent nation was fortunate in its possession of two such richly endowed rivals. Neither left anything unsaid in support of his own views or in derogation of those of his opponent. However, the stars in their courses fought against Hamilton as they did against Sisera. Hamilton's idea of "that happy combination of benevolent assistance to business and laissez-faire as to administration of that business" (page 154) is at last outmoded. To those of us who have witnessed the victories of the democracies in two world wars, strange is his dictum: "Let officers be men of sense and sentiment, and the nearer the soldiers approach to machines perhaps the better" (page 91). No wonder his outburst: "The people, Sir; the people is a great beast!" (page 174).

Not all that Hamilton offered has been rejected. If we have accepted and enlarged upon Jefferson's conception of democracy we have measurably moved in the direction of Hamilton's conception of a unitary government.

Some of the defects of Hamilton's character have been mentioned, including his "somewhat blunted perception of public morality when it came to his friends" (page 289). There were others. He did not hesitate to appeal to religious bigotry when he thought it would serve his purpose (pages 39, 411). He was a lobbyist for special interests in which he had a financial stake (pages 280, 281), and, to repeat, his conduct towards Washington was inexcusable. Washington, by making him his aide, gave him his first chance for advancement. If Washington had not appointed him Secretary of the Treasury his greatest work could not have been done. In approving the National Bank Bill, Washington accepted Hamilton's advice and rejected that of Jefferson and Attorney General Edmund Randolph, both of whom held it to be unconstitutional (pages 270-272). Washington, by threatening to resign as Commander-in-Chief, forced John Adams to give Hamilton the second command of the army over his seniors, Charles C. Pinckney and Henry Knox (pages 376-377). As Mr. Schachner writes: "He had always been able to count on Washington to support him in moments of crisis, to be his shield and protection against his enemies" (page 388). Yet he had written of Washington: "For the past three years I have felt no friendship for him and have professed none" (page 129).

All this and more Mr. Schachner tells with a vividity that makes the events seem contemporaneous. When he writes of Hamilton's part in the preparation of Washington's farewell address and analyzes the completed document against its background (pages 354, 355) we realize how utterly it fails to support the isolationists; when we read of how the House of Representatives rebuffed Hamilton when he desired personally to report his plan for the support of the public credit (pages 247-248) we are reminded of the Kefauver Resolution[6] and the so far unsuccessful attempt to correct the mistake.[7]

Nowhere is Hamilton more alive than when he confers with his clients and presents his cases in court. Al-

(Continued on page 591)

5. So in the days preceding the Confederate War the first loyalty of the residents in the states which had been created out of the public lands was to the nation.

6. "The Kefauver Resolution" by Walter P. Armstrong, American Bar Association Journal, June, 1944, Vol. 30, page 326.

7. The recent Reorganization Bill does not provide for the personal appearance of cabinet members before Congress.

"The Cult of the Robe": Two Concepts of Our Courts

At a time when many lawyers have been voicing a deep concern because of a supposed decline in public confidence in and respect for some of our courts or judges, and the American Bar Association through its House of Delegates has debated and taken action to help maintain the traditional prestige and impartiality of the judiciary (32 A.B.A.J. 493), it seems to be appropriate to summarize in these columns a notable joinder of issue which has taken place lately in legal periodicals which have no general circulation among our readers. Some of the points discussed were fundamental and far-reaching, and the whole exposition of the opposing views was on so high a plane, that they deserve a wide reading and an enduring place in the literature of the profession.

JEROME FRANK

Judge Jerome Frank of the United States Circuit Court of Appeals for the Second Circuit, formerly of the Yale Law School and the Securities and Exchange Commission, author of brilliant books which have been reviewed in these columns (31 A.B.A.J. 479) wrote an article in the *Saturday Review of Literature* under the attractive title of "The Cult of the Robe."[1] Walter B. Kennedy, Professor of Law and Acting Dean at the Fordham University School of Law, who has contributed to these columns (31 A.B.A.J. 214), put to paper in the *Fordham Law Review*[2] a spirited reply, entitled, "The Cult of the Robe: A Dissent." Nominally, the first article and the rejoinder related to the wearing of gowns by judges. Actually, the views contrasted in this notable exchange went much more deeply into the philosophy of the judicial function and the role of judges as the accepted arbiter of legal controversies between men and between men and government. So there is here undertaken a summary and review of the points covered, with the clashing concepts stated largely in the words of the respective authors.

A "Farewell to Life"

If the late Dean Kennedy, who has since died, could have chosen and written what he knew would be his own "farewell to life" and his testament to his students and his beloved profession, it is doubtful if he could have penned anything which he would have regarded as more suitable than his reply to Judge Frank. This article was one of the last things he wrote. It was in lofty tone and showed the utmost graciousness of spirit, along with a kindly humor.

Because Judge Frank's arguments against the wearing of robes by judges seemed to him to proceed on grounds which were at war with all he felt so deeply as to the judicial function and the demeanor of those who discharge it, he put into his reply both his own veneration for the courts as the bulwarks of justice and liberty under law and his grave concern that the rank and file of people shall not come to hold them in low esteem.

Judge Frank's Basic Thesis

The gifted jurist analyzed what he regarded as the practical, symbolical and legalistic aspects of the wearing of robes by judges in the discharge of their court-room duties. In stating his scholarly conclusions against the custom or practice, he adverted to his bold philosophy of many correlated matters. To quote him (page 12):

> The judges are oracles of an impersonal higher law, a body of law absolute and infallible – so believed many who sponsored the judge's gown. Therefore, this garment of sacerdotal origin was appropriate, clothing its wearer with the dignity that befits the augur. Others, more skeptical of the Law's divinity, nevertheless appreciated the public effect of priestly trappings. They were astute in this perception. In the minds of altogether too many persons the judicial garb with its priestly flutterings, inspires excessive awe. Hughes, as Secretary of State, was fallible; Van Devanter, as Solicitor for Interior, was not beyond criticism. But, clad in their solemn black silk, they automatically became for most of the public, if not as sacred as Japan's Emperor, at least brushed with divinity.

DEAN KENNEDY

Dean Kennedy stated as follows the thesis which stirred his protest:

> His conclusion is that such outer garment of the judiciary not only gathers dust and generates heat but it inclines the judiciary to follow the antiquated ways of the law. Figuratively and literally he would consign the judicial robe to the juristic attic along with other outmoded ceremo-

1. *Saturday Review of Literature*, October 13, 1945; page 12.
2. *Fordham Law Review*, Vol. XIV—No. 2; page 192.

nials and Latinized magic of traditional law. His rather severe indictment of the rituals of the courtroom accompanies an ardent plea for liberalism in judicial thinking and a defense of the dissenting opinion which permits the judge to express his individuality and to argue for changes in the old legal order made necessary by the current social and economic developments.

"A Day in Court" for a Differing View

Concerning his juristic adversary's scholarship and well-known readiness to recognize differences of opinion, Dean Kennedy said at the outset:

> Judge Frank would be the first to concede to the conservative opposition "a day in court" in defense of the ancient habiliments of the justices and a caveat against their elimination at least without a hearing, and I use the term, conservative, in its etymological sense of *conservare* — a plea for the preservation of forensic fashions of the past. At least unless the learned Judge proves convincingly that these fashions are harmful and that shirt-sleeved justice promises a higher order of juristic administration. Moreover the delightful democracy which pervades his thesis invites a brief and reasoned argument against it. Such an appraisal puts into practical operation his belief that the judge should descend to the pedestrian level and permit the intimate appraisal of his views by his fellowman.
>
> The present paper attempts to phrase this conservative viewpoint, and first pays tribute to the lively and attractive style of Judge Frank, first evidenced in his trail-blazing book *Law and the Modern Mind* published about 1930. Like a legal Lochinvar from the West, he captured the effete East with his vigorous and critical comment regarding the stand-patism of traditional law and his documented plea for legal liberalism. As a judge his judicial opinions are gems of literary value that give temporary comfort even to the losing lawyer.

Judge Frank's Argument *Ad Hominem*

Dean Kennedy suggested that Judge Frank's critique against the judicial robe "seems to confuse incidental form and incidental substance. His creation of a robe-tabu has gone far beyond the realistic effects of the juristic garment adorning our judges in action." Quoting Judge Frank's testimony of his own experience and replying to it, Dean Kennedy wrote:

> The first argument against his position is strictly an *ad hominem* one. The direful consequences that trail judicial robes strangely and happily escaped Judge Frank in his own judicial experiences. After telling us that the robe smothers independence of judicial thinking and sets judicial minds in a static mold, Judge Frank informs us that no such transformation took place when he assumed the robe for the first time: "When I woke up one morning a federal judge, I found myself just about the same person who had gone to bed the night before as SEC Commissioner." And his many ardent admirers among the lawyers and laymen who have had the good fortune to attend Judge Frank's court or to read his judicial opinions or popular essays will agree that not alone on the morning after but during the four years of his judicial career, Judge Frank, fully robed, has remained the "same person" who served so ably as SEC Commissioner and in other responsible frockless offices of the Government. All of which makes somewhat shaky or at least questionable his generalized contention that a judicial robe clogs the mind, curbs independence of thinking and serves only to conceal the multiple and feeble faults of our judiciary. Not so in the case of Judge Frank. He has in his own daily judicial actions lived an effective answer to his whole paper at least insofar as the subjective harms or evils of the robe are concerned.
>
> But Judge Frank would doubtless admit that he is not alone in surmounting the smotherings of the silken covering that adorns our judges in action. Without leaving Judge Frank's circuit the sterling independence of Judges Learned Hand, Augustus Hand, Knox, Clancy and Leibell—to name but a few—is well known in legal circles. Without discarding the continuity of precedents, which Judge Frank states to be so necessary, the Judges of the Second Circuit have not forgotten, in the words of Dean Pound, that "the law must be stable and yet it cannot stand still."[3]

Holmes and Robe-Wearing

Judge Frank has written often of Mr. Justice Holmes. In this connection Dean Kennedy pointedly said:

> For fifty years Oliver Wendell Holmes wore judicial robes, first as Justice, later as Chief Justice of the Massachusetts Supreme Court and for thirty years Justice of the United States Supreme Court. Judge Frank in his *Law and the Modern Mind* places Justice Holmes on the highest pinnacle of judicial excellence. To him the "Yankee from Olympus" was America's only completely adult jurist and today the Holmesian philosophy is the spearhead of legal liberalism in America. Yet this independent jurisprudence of Holmes was developed while he wore judicial robes for half a century. In the *Holmes-Pollack* Letters, the Justice sings the praises of soft-collars; he probably was uncomfortable and stuffy in his judicial robes. But the point of importance to note on the intellectual side is that he penned his opinions in his shirt sleeves far removed from the "robe-ism" that Judge Frank fears. "The Cult of the Robe" has ballooned a minor matter of dress into the inflated theory that judicial garb curbs and cabins the inner spirit of a great judge. Paraphrasing familiar words, the judicial robe does not make the judge, nor unmake him.

Robes and "Uniformity of Decision"

Concerning Judge Frank's summing up of the subjective aspects of robe-wearing, Dean Kennedy said, with quotations again from Judge Frank's text:

> A dissent must be registered against Judge Frank's very broad peroration, bidding a long farewell to forensic frocks and robing rooms: "Unfrock the judge, have him dress like ordinary men, become in appearance like his fellows, and he may well be more inclined to talk and write more comprehensively. Plain dress may encourage plain speaking." This sentence, typical of the undertone and argument of Judge Frank's entire paper, is exceedingly difficult to follow when we reflect upon the course of current judicial decisions in the Supreme Court of the United States, a Court substantially reformed in recent years with the advent of eight new Justices. These Justices will wear judicial robes at every session save only for the day mentioned by Judge Frank, when Mr. Justice Black absentmindedly appeared on the bench minus his robe. Although burdened and weighted by their robes which allegedly prevent freedom of judicial action and individualism of decisions by the judici-

3. Pound, *The Interpretations of Legal History* (1923) 1.

ary, the United States Supreme Court, robed though they are, have produced a greater number of divided opinions than any other Supreme Court in the same short span of years. In the 1943 term over 175 dissenting votes were recorded and over 50% of the cases decided with full opinions disclosed a divided Court. The tendency of the Supreme Court to multiply the number of opinions, both in concurrence and in dissent, has grown appreciably in the last few years.[4]

Certain it is that the argument against the robe as a barrier to judicial independence at least stops at the door of the robing room of our highest judicial tribunal. "The robe," says Judge Frank, "gives the impression of uniformity in the decisions of the priestly tribe." If there is one quality that the robed Supreme Court in Washington does *not* possess—it is uniformity or "the impression of uniformity."

"Objective" Effects on Litigants

As to the claimed effects of robe clad judges on litigants, witnesses, young lawyers, Dean Kennedy replied:

> So much for the *subjective* aspects of the robe. Judge Frank makes a strong argument against the *objective* effects of "robe-ism" because of its sinister, undemocratic, fearsome consequences to all persons who come in contact with our courts. The learned Judge contends that the robe tends to frighten the litigants, causes honest witnesses to give the impression that they are not telling the truth, upsets young lawyers and makes a fetish of formalism. True, an ordinary witness is not quite "at home" in the courtroom; and it is suspected that he would not be at perfect ease even if the judicial robe is discarded. It is not the robe that frightens him; it is because he is called upon to speak in public with the critical eyes of a hostile attorney ready to confuse him by cross-examination. Moreover, a judge who is kindly at heart does not become a tyrant through the wearing of his mantle of authority. An overbearing jurist does not shed a deeply imbedded arrogance through the simple expedient of removing the judicial gown.
>
> More astounding to the conservative is Judge Frank's assertion that the honest witness gives the impression of not telling the whole truth by reason of the emotions produced by the garb of the judge on the bench. This is hardly the place to analyze the causes of perjury, real or imagined, but it is not very convincing to assert that the flowing folds of the judge's attire contribute greatly to a witness's tendency to depart from the truth. It might be suggested that this badge of authority would act as a deterrent. But most debatable of all is the Judge's contention that the robe has somewhat the same effect upon the young lawyer who is scared by the frocked judge. Robe or no robe, a young lawyer in his callow years of practice is not at ease in the court room. His skill and confidence come slowly with the years; they cannot be accelerated through the disrobing process argued for by Judge Frank. May I note an example of this attitude among young lawyers in the making? The Fordham University School of Law operates a Practice Court which allows the law students to try cases after the manner and style of their lawyer-brothers. These cases are frequently presided over by graduate-judges from the federal and state courts. These judges in the past have appeared without robes, not because we favored the robeless viewpoint, but in order to lighten the impedimenta of our guest-judges. While these judges are objectively sympathetic and helpful and without robes, our youngsters at first suffer courtroom jitters in the presence of a real judge. Isn't it possible that a realistic evaluation of the inherent authority of the judiciary rather than mental disturbances over the presence of a robe accounts for the attitude of litigant, witness or lawyer in the surroundings of a real courtroom? I have noticed that this initial fear of our law students wears away during the progress of the trial not because of the "no-robe" technique accidentally followed in our Practice Court but because the young lawyer in the making gains confidence and poise on his feet.

Criticism of Emphasizing Form

Judge Frank summed up his argument as follows:

> The robe of the judge is an antique garment, awkward, impractical, and, to the dispassionate eye, of no esthetic value. It is of a piece with the "Hear ye! Hear ye!" that opens court sessions, along with the quaint medieval Latin and the obsolete Norman French often incorporated in judicial opinions.

To this Dean Kennedy made rejoinder:

> One last point of the dissent remains to be mentioned: A temperate plea for the retention of the robe, its symbolism and its importance as a bit of traditional formalism that does no harm, as we have attempted to prove above, but on the other hand does real good. Judge Frank concedes freely that there is reason, purpose and benefit in the soldiers' and sailors' distinctive garb. Form plays an important part in the efficiency of the Army and Navy. So it is in the law. I accept the criticism of Judge Frank that form may submerge substance and so develop into a very substantial evil.
>
> We probably could abandon the double-talk of the court officer announcing the opening of the court. It must be conceded that law would not end if the gownless judge entered the courtroom without any opening cry or without the lawyers, witnesses or spectators arising in respect to the judge. Judge Julian Mack, mentioned by Judge Frank, frequently discarded his robe when presiding at a trial. He also held trials in his chambers seated on a level with the witnesses and the lawyers. These are democratic leanings which merit approval provided that it is remembered that Judge Mack was a great judge and that his greatness consisted of something more durable than taking off his gown, or even his coat, in the heat of a summer judicial session. Judge Frank has convincingly satisfied the opposition that there are doubtless physical objections to the wearing of gowns or wigs particularly in the summer months. It is interesting to note that *The Law Quarterly Review*, staid English law periodical, states that the English judges have no scruples about removing their wigs on very hot days.[5] A more terrifying argument against the physical effects of such headpiece was written down in 1664 by Pepys when he said: "Thence to Westminster to my barber's to have my Periwigg he lately made me cleansed of its nits, which vexed me cruelly that he should put such a thing into my hands".[6] Our objection to the elimination of the change in forensic fashions is solely based upon Judge Frank's contention that they effect the intellectual activities of the judiciary.

"Red-Shirted Justice"

In closing his reply, Dean Kennedy adopted and re-told the following incident:

4. Kennedy, "Portrait of the New Supreme Court I" (1944), 13 *Fordham Law Review* 1-16; Kennedy, "Portrait of the New Supreme Court II" (1945), 14 *Fordham Law Review* 8-36.
5. (1945) 61 *Law Quarterly Review* 32-33.
6. Ibid at page 33.

Chief Judge John T. Loughran, recently elevated to the highest judicial office in New York State, tells amusingly about one of his first cases before a Justice of the Peace in his home town of Kingston, New York.[7] The Justice was a cobbler and held court in his cobbler shop. Without robe, without coat and in red flannel undershirt, he dispensed rural justice. The particular trial in which Judge Loughran was interested, involved the charge of larceny of house shutters which resulted finally in a victory for his client.

Both Mr. Loughran and his opponent had been interested in the J.P.'s intentness in keeping, as they thought, a precise record of the proceedings. During the trial it was noted that he was making constant notations upon a sheet of paper before him. It appeared that he was periodically making dots on one side of the sheet or the other. The young counsel naturally assumed that these notations recorded incisive points of fact or law developed during the trial. At the end of the case they ventured to ask the shirt-sleeved Justice to interpret his crude recordations. They were indeed disappointed to learn that their forensic skill had not greatly occupied the thoughts of the cobbler-jurist. It developed that while they were immersed in the examination and cross examination of the witness and their spirited summation, the Justice of the Peace was engaged in counting the automobiles that passed his window. He marked on the left side of the sheet the autos going south. Those on the right side indicated autos passing his window in the opposite direction. The Justice of the Peace announced to the young barristers with some pride that on a busy Decoration Day he had counted 1200 cars.

The moral of the cobbler-Justice of the Peace is sufficiently clear and requires no labored development. Cobbler shops and red flannel shirts are typically American but we would hardly argue for the extension of this form of administering justice in complicated cases. As a matter of fact the jurisdiction of the non-lawyer justice is disappearing for reasons many and diverse. Contrariwise the presence of a robed justice in a well appointed courtroom does not itself insure the correct decision or true administration of justice. Thus far we go along with the argument of Judge Frank. Even so, a black robe rather than a red shirt, has its advantages in symbolizing the dignity and the majesty of the law and the conscience of the state speaking through its judiciary.

In Summation for Retention

Concluding his earnest argument that the wearing of robes should not be abolished, Dean Kennedy made his "farewell" plea:

> The learned Judge has not demonstrated that the abolition of the judicial robe would better the judicial process in any substantial degree. On the other hand, there is warrant for the belief that American traditions and the continuity of our institutions are inspired and perpetuated by representative symbols. Our flag, which Thorstein Veblen once summed up as a piece of woolen bunting, has assumed a new and glorious texture during the war years. The uniforms of our Armed Forces also spell out untold sacrifice and suffering in our behalf. Symbolism has been partially in eclipse, it is true, in recent years. As late as 1937, Thurman Arnold in his *Folklore of Capitalism* dismissed the symbol of "cruel German" as a mere bogey man invented to frighten American adults.[8]
>
> Lacking good reasons for its removal and finding adequate reasons for its long tradition in the law, we enter this wholly inadequate plea for the continuance of the "Cult of the Robe".

Late in July, a trial judge of the Supreme Court of one of the Provinces of Canada sat in his chambers, chatting with the Chief Justice of his Court. The day was hot and humid. The time came for him to go on the bench in his nearby courtroom, to hear a brief uncontested application. "I don't think I'll put my robe on—it's too hot," he said. The Chief Justice replied: "Oh, yes; you will; we cannot let our standards down, in these times." The trial judge put on his robe and went into the courtroom.

7. This story is delightfully told by Chief Judge Loughran's former law partner, Surrogate James A. Delehanty of New York County in his tribute to Judge Loughran, "John T. Loughran—The Lawyer" (1935), 4 *Fordham Law Review* 170.

8. Arnold, *The Folklore of Capitalism* (1937) 30.

Passage of the Fullbright Bill

A step of great long-range significance and one of interest to all lawyers was the signing by President Truman on August 1, of the Fullbright Bill, which authorizes the State Department to use some of the proceeds from surplus property sales abroad for exchanges of students and other educational activities. The bill is designed to utilize foreign credits in many countries in lieu of American dollars for American surplus property. If funds are negotiated to the limit of the bill's potential, and if facilities abroad develop capable of handling the students, it is possible that 100,000 or more American students would be sent abroad under this bill in the next two or three decades. It is hoped that the grants will be made by the appointed Scholarship Board in the spring of 1947 for the school year beginning in the autumn of 1947.

Editorials

An Issue for the Mast-Head

In connection with the sketch of the life of David T. Watson, a great American lawyer at the turn of the century, there may well be recalled his words of warning in 1904:

> Our people believe in, and justly believe in, the ability and integrity of our courts. . . It is the great bulwark of the safety and growth of our people. If evil days come, in which our courts shall be evaded, instead of sought for, if the people come to believe that its administration is not free from corrupt influences—then beware, for the dykes will be cut and the overwhelming tides will come in. I would do all things to avoid this.

An affirmative and active respect for the courts and the maintenance of their powers and jurisdictions did not seem to him to be sufficient to fulfill the duty of American lawyers. Misconduct and abuses in judicial office should be rebuked and punished. He said:

> Is not our duty plain? Should not each of us do his utmost to keep the courts pure and the administration of justice undefiled? If . . . any judge is false to the duties of his office as sternly rebuke and seek his punishment. That is necessary for the conservation of the bench.

Watson pointed out that the great jurists of the past had made "the English-speaking judge a synonym for calm, impartial, honest judgment." As to the constitutional rights of individuals in respect of their lives, liberty, and property, he said that "the weakness of mere paper, pen and ink to themselves carry out and make effectual the written declaration becomes apparent. The power and duty to protect human rights against government had to be lodged somewhere, and the founders of our republican form of government "chose to lodge them in the judiciary." He saw grave dangers in the disposition of the highest courts to abdicate that function and to leave the legislative branch as the sole judge of what laws it can pass, even when they are in derogation of rights vouchsafed by sacred constitutional guarantics. To make the law-making power the sole arbiter was seen by him to render vain "the efforts of man by a mere written Constitution to protect himself in the exercise or possession of his liberty or property or pursuit of happiness." The rise of administrative absolutism was not foreseen by Watson, but it is even more insidious and dangerous.

So from David T. Watson's great address before the Sharswood Club in Philadelphia in 1904, we derive three facets of the ageless issues as to our courts:

> Respect for an impartial and fearless judiciary as the bulwark of free institutions and republican government, which means judges who are free from bias, who keep out of extraneous controversies and intrigue, hold themselves aloof from collaboration with the Executive, and have no disposition to use the powers of their Court to further particular policies or give advantage to special interests.
>
> Stern rebuke and punishment for misbehavior in judicial office.
>
> Restoration of the powers and duties of the courts to protect the constitutional rights of persons and property against invasion by the Executive or by the Congress or by both.

To these three principles, constituting one great issue, the American Bar Association is committed.

Welcome to the General Assembly

The people of the United States will welcome most heartily this month the distinguished members of the General Assembly of The United Nations. That representative body will come together for its first meeting on American soil, at its building on the Flushing Meadows in New York City, on September 23, unless the Conference of Foreign Ministers in Paris is prolonged so as to require a further postponement of the opening session here.

The accredited spokesmen of the Governments and peoples of the fifty-one Nations will meet with many evidences of the cordiality of the American welcome, the warm good will of our people, the earnest hopes and prayers for the success of their fateful deliberations. We join in the heartfelt greeting to all members of the General Assembly and of their staffs.

As in the legislatures of all lands where the traditions of free government are maintained, very many of the delegates and their advisors will be members of the profession of the law. To Paul-Henri Spaak, the eloquent Belgian lawyer who is the President of the Assembly, and to each of his colleagues in the ministry of law and justice, we express an especial welcome to American soil. With their brethren of other lands, the lawyers of this country have rallied to the support of The United Nations; they will be happy if they have the opportunity to meet and greet those who work in

AMERICAN BAR ASSOCIATION

Journal

EDGAR B. TOLMAN, *Editor-in-Chief Emeritus*.....Chicago, Ill.
WLLIAM L. RANSOM, *Editor-in-Chief*.....New York, N. Y.
LOUISE CHILD, *Assistant to Editor-in-Chief*.....Chicago, Ill.

BOARD OF EDITORS

THOMAS B. GAY.....Richmond, Va.
WILLIAM L. RANSOM.....New York, N. Y.
E. J. DIMOCK.....Washington, D. C.
REGINALD HEBER SMITH.....Boston, Mass.
WALTER P. ARMSTRONG.....Memphis, Tenn.
WILLIS SMITH, *President of Association*.....Raleigh, N. C.
TAPPAN GREGORY, *Chairman House of Delegates*..Chicago, Ill.

General Subscription price for non-members, $3 a year.

Students in Law Schools, $1.50 a year.

Price for a single copy, 75 cents; to members, 50 cents.

EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

the same great cause. The lawyers have an especial responsibility and duty to see that what is ventured is kept within the bounds of practicable accomplishment and that no overreachings or compromises are sanctioned which would do violence to the institutions of freedom under any legal system.

Americans have long looked forward hopefully to this coming of the General Assembly. Many have wished that is could have been convened months ago. They have been expectant that in the deliberations of The United Nations, as in the San Francisco Conference, the collective judgment of the delegates of all of the Nations will speak with a stronger, clearer voice for peace and law, than any lesser group could do, no matter how powerful some of its members were in waging war. Belatedly it is being recognized that, as Secretary-General Lie has said, "The United Nations is no stronger than the collective will of the Nations that support it," that only the mobilized moral judgment of the peoples can bring peace to a world "in the midst of a giant post-war upheaval," and that the public opinion of every country must be informed and aroused to do its part.

To the men and women of the General Assembly, we give assurance that Americans have not despaired as to The United Nations. Our habits of independent thinking and our access to ample means of information have given some awareness of the obstacles and some uneasiness that the dangers may not be pondered and faced in time. Most Americans would probably confess to a sense of bewilderment and frustration that the international problems are, to us as perhaps to others, so new, so complicated and so baffling—the failure to agree, the intricacies of the veto power, the clashes as to the control of atomic energy, the World Bank and the loans, the kaleidescopic shifts of tensions and crises from the Security Council to the Foreign Ministers and back again—most of all, the failure of men of good will to come to agreement and make headway.

Granting that the "One World" must be kept foursquare with justice and fair play and the enlightened judgment of the rank and file of informed peoples, Americans have not accepted the idea that acceptable solutions cannot be found where only national interests and the control of territories are involved. Lawyers who take part in the processes of free governments learned long ago the arts of accommodation and adjustment by which the common ground for agreements is found.

To all who come in the name and cause of The United Nations, the Association extends the hearty greetings of American lawyers. The hopes and prayers of our people will go out in support of those who meet in the General Assembly.

The Law Center

The burdens which contemporary civilization must place on law, as its sole hope for survival, are staggering in their immensity.

The body of the law itself is vast and complex almost beyond endurance. Yet if it is to be vital in content, efficient in operation, and accurate in aim, it must borrow truths from the political, social, and economic sciences, from philosophy, and achieve a genuine degree of synthesis with them.

The fund of available knowledge is greater than any one man can master and far more than any educational institution can teach.

Elsewhere in this issue, Dean Vanderbilt of the New York University School of Law, and a former President of the American Bar Association, earnestly and with a vision germinated by his unusually wide experience, proposes the Law Center as a constructive solution of the problem.

A Law Center must be conducted by, and be an integral part of, a law school. It should be properly housed and equipped; it requires generous financial support. It should be undertaken in the grand manner —in the spirit of Mr. Justice Holmes' declaration:

> The business of a law school is not sufficiently described when you merely say that it is to teach law, or to make lawyers. It is to teach law in the grand manner and to make great lawyers.

Ours is a great country, and we shall need many Law Centers and diverse experimenting in their development.

The new Medical Centers constitute the answer our sister profession is giving to this problem—closely analogous to our own—of quickly pooling all knowledge that can help to cure disease and banish pain. Radioactivity, released by atomic energy, may prove more mighty than dread cancer. Penicillin, derived from a lowly fungus, opens a whole new approach to nature's secrets. If science had placed in General Goethals' hands airplanes with DDT to spray on mosquito-infected swamps, he could have built the Panama Canal in record time and with much less loss of life.

In the educational world there are stirrings; there are many signs and portents. Some law schools have announced their plans; others are still in the process of formulation. Dean Smith of Columbia Law School, for example, also proposes a Law Center, if it can be financed, and makes this further suggestion; that it contain and operate a law office for persons of moderate means.

Our goal is to make the law a more perfect instrument for meeting the imperative needs of a war-shocked society in a new world. "This goal"—to repeat the prophetic words of Professor Redlich—"can be reached only through long and fruitful labor on the part of all elements of American legal life, the judges, the attorneys, the university law schools, and the legal scholars of this country . . . a goal that is placed very high, and that can therefore only with difficulty be attained, but that is none the less completely attainable."

The lawyers of the country are girding for battle, and forming ranks. They look to our law schools for leadership.

To Amend the Association's Constitution

Members of the American Bar Association present at the Annual Meeting in Atlantic City on October 28-November 1 will have the opportunity of voting on several amendments of the Constitution and By-laws of the Association. The Assembly and the House of Delegates will vote separately on them.

The text of each of these proposed amendments is given elsewhere in this issue, which contains the formal notice of their filing.

The present Constitution and By-laws of the Association were adopted in 1936. On the whole, they are deemed to have worked very well. They have not been changed fundamentally during the ten years.

Some of the amendments are merely formal in character, to clarify or confirm practices which have been developed. Others are changes recommended, in the light of experience, to improve the Association's structure and adapt it to the larger membership and broadened work. It will be for the members present in the Assembly and for the House of Delegates to decide whether all or any of them will be adopted.

The amendments have been carefully drafted by the House Committee on Rules and Calendar, which has filed them to enable action on them. They were explained to the House on July 1 (32 A.B.A.J. 461), but no vote thereon at that time was asked for. Members of the Association who do not expect to be present in Atlantic City should make known to their representatives in the House of Delegates their views on the submitted amendments.

The Letter and the Spirit

The American Bar Association and its JOURNAL strongly urged the Congress to enact the Hobbs-Wagner bill to increase the pay of Federal judges to the extent of $5,000 a year. This meritorious measure was advocated in the interests of fair play for judicial officers who had been given no increase in pay for more than a score of years. Our advocacy was coupled with an expectation of the observance of the letter and the spirit of the constitutional limitation on appointments to judicial office, which is that

> No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased during such time.

Knowing that they were scheduled for appointment as Federal judges, Representatives Luther A. Johnson of Texas and John W. Murphy of Pennsylvania resigned as members of the Congress just before the House voted on the $5,000 increase in the pay of judges. Presumably they were advised that the voluntary resignation of a member of the Congress before the end of the term for which he was elected terminates "the time for which he was elected", so that they will be eligible to be appointed as judges and to receive the $5,000 a year increase which passed the Senate and was pending in the House, before their resignations. The constitutional questions of their ineligibility for the appointment or for the increase seem not likely to be raised.

The question whether the spirit, if not the letter, of the constitutional provision will be violated by men who have taken oath to obey the Constitution remains. We do not state it in a spirit of personal criticism of the action of the two Representatives in leaving their constituencies without representation while vital legislation was pending. We do not intend, however, that such a matter affecting public opinion as to our courts shall go by without report or comment on the part of this journal of the organized Bar.

In fairness we have to say that the incident reflects mostly a point of view which lately has become usual and general. It began when the powers and processes of government were used to force repeated wage increases for favored labor groups, where collective bargaining had produced no such increases. With the American economy thus dislocated through action according to forms of law, the tendency became rampant when producers, farmers, wholesalers, retailers, countered by insisting on large increases in the prices of their products: "we might as well get ours, too", has come to be a slogan often heard. When they are on the bench, the new judges and their families will be beset with the same high costs of living and high taxes as have caused such hardships to their senior colleagues, as well as to lawyers and other citizens outside the favored groups. That they have taken steps designed to get around the constitutional provision and preserve their eligibility for appointment and for the increased salaries will not be regarded as out of line with a manifest spirit of the times.

A Notable Record in the Congress

The year 1946 will be long remembered, in the annals of the Association, because of the unprecedented extent of the outstanding accomplishments through the enactment of legislative measures drafted under Association auspices or long advocated by the Association. In this respect no other Congress has done as much as did the 79th Congress, which in August ended its regular sessions.

First of all was the unanimous passage of the McCarran-Sumners Administrative Procedure Act (S. 7 as revised; H. R. 1203), for which the Association has been contending for ten years.

Next was the Hobbs-Wagner bill (S. 920; H. R. 2181), strongly supported by the Association, to increase

to the extent of $5,000 the salaries of all Federal judges, which had been stationary since 1926.

Finally and climactically, in the closing hours of the Senate sessions, came the inspiriting victory, by a vote of sixty to two, in the Association's long fight to obtain American acceptance of the compulsory jurisdiction of the World Court in the enumerated categories of international legal disputes—which John G. Buchanan of Pennsylvania ranked as one of the three epoch-marking efforts and services by the legal profession (32 A.B.A.J. 446-450) to the cause of justice, law, order and peace, as substitutes for the rule of force and arbitrary power.

In various other matters during the two years, notably as to The Charter of The United Nations and the annexed statute of the World Court, and the enactment of The United Nations Participation Act, the considered views of the Association were taken into account and given weight, but in 1946 these three enactments of the recent session are outstanding.

The 79th Congress began its sessions when America and its Allies were engaged in a desparate war for survival. Against obstacles of unprecedented complexity and difficulty, this Congress has had to cope with many of the momentous problems of the transition to peace. Partisans and historians are writing their differing appraisals of its successes and failures. American lawyers will deem it appropriate to record here that this Congress found the time to act favorably on the most important of the Association's pending recommendations.

To the members of the Senate and House who advocated and voted for these measures, to the members of the Committees in the respective Houses who received favorably the Association's recommendations and labored to perfect them and supported strongly in the Committee reports, to The Attorney General of the United States who supported cordially the two proposals under his jurisdiction and the State Department which gave final and decisive approval to the third, and to The President of the United States, who made these measures law by his signature, we express and record the thanks and appreciation of American lawyers, irrespective of party. There was no partisan division on any of the three bills, and practically no division at all.

Within the ranks of the Association and the profession, it must be recognized that as the merit of the measures had not been decisive hitherto, much credit for the accomplishments in 1946 should be given to the leadership of President Willis Smith and the esteem in which he is held by members of the Congress and the Executive Departments, to the competence and thoroughness of the Association's advocacy of the bills through its Committee chairmen and other spokesmen, and to the high repute in which the House of Delegates is increasingly held as a public-minded and truly representative senate of the legal profession and as a trustworthy cross-section of enlightened public opinion throughout the United States.

In acclaiming the good work which all these men have done, at great sacrifice of their leisure, their recreations, and even their time for clients, in order to make possible this halcyon year of legislative fruitions, it will not be overlooked that our leaders in 1946 have builded on, and have carried to success, the like labors of scores of devoted servants of the Association, whose enduring contributions are unrecounted, but should not be forgotten, in this hour of satisfaction with what has come to pass.

The Victory for Peace Through Law

There is abundant reason for abiding satisfaction that the Association's years of efforts in behalf of the World Court and American adherence to its jurisdiction came climactically to success on August 3, when the Senate voted, 60 to 2, to authorize the filing of a Declaration of this country's acceptance of the jurisdiction of the International Court of Justice as obligatory upon it in the enumerated classes of its legal disputes with other Nations which have filed like Declarations, under Article 36 of the Statute of the Court.

The Resolution of Senator Morse (S. 196 as amended), so decisively passed by the Senate following the unanimous report of its Committee on Foreign Relations, fulfills the reiterated recommendations of the American Bar Association, upon the report of its Committee. The last vote taken by the House of Delegates was on July 2 and was unanimous (32 A.B.A.J. 485). The hearings urged by the Association followed on July 11 and 12, at which spokesmen for the Association made earnest pleas for immediate action. The unanimous report by the Senate Committee followed on July 24, and the Senate gave precedence to the Resolution and adopted it during the last few hours before the 79th Congress adjourned.

An account of the hearings and of the Senate debate and action is elsewhere in this issue. The general acclaim of the Senate's action in taking the final step to end America's long aloofness from the World Court should be tempered, among lawyers who have followed the subject closely, with their appraisal of the two amendments made by the Senate. The significance of one of them should be pondered.

The text of the multi-sponsored Resolution prepared by Senator Morse and unanimously recommended by the Senate sub-committee, was given in 32 A.B.A.J. 27, and can be compared with the text of the Resolution as it was adopted by the Senate. The amendment offered by Senator Vandenberg, to take account of a suggestion received from John Foster Dulles, opened no serious question. Conceivably the United States might have a legal dispute which involved several Nations as parties, conceivably one or more of them might not have filed a like Declaration, although the prob-

ability of that will rapidly lessen, now that the United States has aligned itself on the side of the Court as the means for the peaceful settlement of legal disputes which lead to friction and might lead to war.

In any event there could be no valid objection, and there might be some advantages, in making the Resolution provide clearly that the United States should not be bound to submit a dispute to the Court unless all of the parties to the dispute had bound themselves to accept the Court's jurisdiction and determination.

Senator Connally's amendment, as to disputes involving "domestic" matters within the United States, presented a more serious question. Article 2, sub-division 7, of the Charter provides that "Nothing contained in the present Charter shall authorize The United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter . . . ." Article 36, sub-division 6, of the Statute of the Court, provides that: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." The United States agreed, by ratifying the Charter and the annexed Statute, to be bound by their provisions. The Connally amendment undertakes to subject the filed Declaration to a specific reservation or condition that if a dispute arises to which the United States is a party, this country will itself determine whether it involves a matter "essentially within the domestic jurisdiction" of the United States and so not required to be submitted for settlement by the Court, in view of the express provisions of the Charter.

Chairman Elbert Thomas of the Senate's sub-committee strongly opposed this amendment, as did Senator Morse. The latter said, however, that he would prefer to have his Resolution passed in August with the amendment, rather than to have action deferred until January, when the amendment might be defeated through fuller debate. The vote in the Senate was decisively for the amendment; the majority made it clear that it proposes to reserve and preserve for the United States full freedom of decision and action as to submitting to The United Nations, even to the Court, matters which are "essentially within the domestic jurisdiction" of this country.

We do not here express criticism or regret as to the amendment, but we state its implications and the possible complications from it. The House of Delegates has taken no action which is contrary to the Morse Resolution as passed by the Senate, with the Connally amendment in it. The amendment is, we think, in fact consistent with the 1944 vote of the House in opposition to any manner of "super-state" (30 A.B.A.J. 652). In December of 1945, the House was not prepared to debate and act on a Committee proposal which would have raised the fundamental question as to "sovereignty" (32 A.B.A.J. 200), and it was not pressed.

Nevertheless, the questions remain, and will some day have to be faced: What matters are "essentially within the domestic jurisdiction of the United States?" Senator Connally's speech in the Senate raised some large questions. With the American Declaration carrying in the Connally amendment, will it prevail against the Statute? Can a question of the Court's jurisdiction be said to have arisen, as a dispute involving the United States, if the latter has conditioned its Declaration upon its own determination as to whether or not an essentially "domestic" question is involved? To what extent does the Senate's vote on the amendment indicate that the United States still wants and insists on a "veto power" as to matters which involve it, in The United Nations, even the great Court?

We agree heartily with Senator Morse that the immediate passage of the Resolution was highly vital, that whatever questions the amendment may create can and will be ironed out in due time and are not fatal or insuperable, and that the Senate's action is a vast step forward in the eternal struggle for peace, justice and law among the Nations. Nothing in the history of the World Court or in its present personnel suggests that the tribunal would overrule any sincere and well-grounded plea that the subject-matter of a dispute came "essentially within the domestic jurisdiction" of any country.

So we hail the Senate's action as another mile-stone, and an outstanding one, on the long road. The great objective of American adherence to the Court and acceptance of its compulsory jurisdiction has been accomplished only after nearly twenty-five years of effort by the organized Bar, during which there have been many discouragements and set-backs. Many great leaders of the American Bar, who were greatest when they labored in this cause, gave to it their best efforts—Elihu Root, Charles Evans Hughes, William Howard Taft, John W. Davis, Frank B. Kellogg, Newton D. Baker, John Bassett Moore, Cordell Hull, Henry L. Stimson, Manley O. Hudson, Orie L. Phillips, Frederic R. Coudert—truly a galaxy of the illustrious, with this list by no means complete. Their services are gratefully remembered by their colleagues in the American Bar, in this hour of victory for the cause to which they gave so much.

Members and Readers

We who plan and do the work which brings the JOURNAL to the desk of each member of the Association each month do not know what our readers think of the contents of their publication or what they would preponderantly wish its contents and policies to be. Thus far we have had to be guided largely by our own impressions, aided by the letters which we receive and by what is said to us orally—neither of which may be completely representative of the views of a majority.

In the nature of things, among more than 36,000 members there are very different and diversified tastes in reading, views as to policies, and opinions as to what the contents of the JOURNAL should be. Rarely is any article or department such as to arouse and hold the interest of all of our members. We have to try to obtain and publish articles and features which appeal to a variety of interests and preferences.

We are doing what we can to make the JOURNAL an attractive and readable publication and an outspoken, effective advocate of the objects and policies of the Association, all in the interests of the profession and the public. To fulfill that purpose, we should be glad to have our contents be such as our readers would preponderantly wish and approve.

Above all, we wish this publication to be effective as a champion of the American form of republican government under the Constitution, of law and the improved administration of impartial justice, of competent Courts kept free from the actuality or the appearance of partisanship and bias, of peace and justice in the international sphere, and of liberty and opportunity and individual rights kept secure under the American system of private enterprise, as opposed to collectivism and arbitrary power under any name or in any form.

We of course do not know whether our members realize that they have the chief part in bringing a magazine with such a program and purpose to the desks and into the homes of more than 36,000 men who are respected and have influence, in practically every community in the United States; also, to many reading and reference libraries, law schools, newspaper and magazine editors, judges, universities and colleges, teachers, students and writers on public affairs—the components of a country-wide public opinion. If you wish more people to read and heed the contents of your JOURNAL, the way to bring that about is to obtain more members among lawyers and more subscribers among laymen. We have many readers, and some subscribers, who are not lawyers.

We feel that, as compared with other national publications, your JOURNAL is in a unique position to render an independent public service. It welcomes advertising which it deems to be suitable for its columns, but its existence is not dependent on advertisers or advertising revenues, on newsstand sales, or on general subscriptions or circulation. The publication of the JOURNAL is made possible by the dues paid by the increasing number of Association members, who are in general accord with its objects and program. We are thus free to fight hard for that program and philosophy of free institutions; and if we steer the sound course, we are assured of readers and advocates in practically every community.

Through the sending of a questionnaire to a cross-section of our membership throughout the United States—a number large enough to assure its representative character but with the individuals chosen at random—we are about to make an effort to find out what our readers actually want their JOURNAL to contain and publish. If you receive one of these questionnaires, we hope that you will take the time to fill it out completely and return it promptly. If you do not receive one, we hope that you will write to us, freely and frankly, your views, criticisms and suggestions, for consideration in connection with the results of the questionnaire.

Good Men for Good Pay

Harold D. Smith, who was Director of the Federal Budget for seven years until he recently resigned, rendered a public service in calling attention to the necessity that many salaries paid by the Government be increased substantially, in order to attract and hold men of ability and experience commensurate with their responsibilities in conducting the world's largest business—the Government of the United States. In leaving the Federal service in order to become Vice President of the International Bank for Reconstruction and Development, he enumerated the unprecedented number of recent resignations from "key" posts in administration, and wrote to The President:

> Had this opportunity not arisen it would only have been a short time until existing limitations on the salaries of public officials would have forced me out of the Federal Government.

During the war, it was practicable to "draft" men of large capacity and executive experience, to fill jobs essential to the war effort. Men who were unable to don uniforms were happy to go to Washington to help mobilize production and transportation for wartime needs. Usually they did so at considerable financial sacrifice and sometimes largely at their own expense.

With the ending of the war, the efforts to persuade such men to come to Washington, or even to stay in posts there, have less of patriotic command. The complaint is common that men of the type who ought to be in the Government cannot afford to accept proffered appointments to administrative or legal positions. Attorney General Tom C. Clark has told of like difficulties in obtaining the consent of men whom he wished to recommend for appointment to the Federal bench.

The reasons why men of superior qualifications hold back from public office are various—the lack of adequate pay is only one of them. They do not like the "limelight" and the criticisms; they do not like the compromises with conscience, the need for getting along with the vain and the unfit; they do not wish to take part in administering policies which are repugnant to their sense of reality and their deeply-rooted convictions. In many instances, however, they refuse because the pay is so low as to be unjust to them and their families, under the runaway costs of living. Acceptance is too

often limited to those who are not dependent on income currently taxable.

This is not a wholesome state of affairs; it is not "good business". It keeps out of the Federal service those who are experienced in efficient and economical administration. It excludes many men of character, independence, and honesty of purpose. To give a fifty per cent increase to all agency heads and their assistants, all department heads, "key" secretaries and administrators, and all Senators and Congressmen, would cost about one-one-thousandth of one per cent of the total Federal payroll. Substantial increases for all of the great army of Federal employees would run into much more money but not to a large sum in comparison with the total Federal outlay. Fewer employees and better pay would serve all purposes except the volume of political patronage.

"The people must not only approve but demand the payment of salaries to administrators commensurate with their responsibilities," says Mr. Smith. This would be in the public interest. But it is equally true that the appointing powers must select administrators who have abilities, experience and courage commensurate with their salaries as well as their responsibilities.

There is no gain through increasing the pay of Federal judges if the appointees will be chosen chiefly to reward partisan or factional subservience and if they will receive on the bench a compensation greater than they ever earned in their lives in the profession. There is no sense in increasing the salaries of administrators if the posts will go to inexperienced men who will take public office because they cannot make a comfortable living in private life, or if the higher pay will continue to go to our "too brilliant brethren", whom Attorney General Clark recently said should be taken to "the legal woodshed" (32 A.B.A.J. 453).

The issue may best be understood by those who have the responsibility for salaries and for appointments: We believe that the people will heartily approve and demand just and adequate salaries for Federal administrators, law officers, agency heads, and employees generally, as soon as they have reason to feel sure that the higher pay means the appointment of men of higher ability, character, courage and experience, and will not go chiefly to the inept, the self-seeking, the inexperienced, and the servants of party politics or ideologies.

The Supreme Court Politics and Extraneous Controversies

Charles C. Burlingham, beloved senior of the New York Bar, has recommended that "in the confusion of voices about the Supreme Court", it may be well to "go back seventy years and read what Chief Justice Morrison R. Waite wrote to his nephew, John Turner Waite, in 1876, when he was asked to permit his name to be used as a candidate for the presidency."

Mr. Burlingham has sent a copy of the letter to the JOURNAL. Its accuracy has been confirmed to him by Chief Justice Waite's grandson and name-sake, of the Cincinnati Bar. This is the letter:

"Of course, I am always grateful to my friends for their efforts in my behalf. No one ever had those more faithful or more indulgent and more cause for gratitude than I. But do you think it quite right for one who occupies the first judicial position in the land to permit the use of his name for a mere political office? The Presidency, although high, is only political. In my judgment my predecessor detracted from his name by permitting himself to think he wanted the Presidency. Whether true or not, it was said that he permitted his ambitions in that direction to influence his judicial opinions. I am not one of those who believe he did so consciously, but one who occupies this position should keep himself above suspicion. There can't be a doubt that in these days of politico-judicial questions it is dangerous to have a judge who thinks beyond the judicial in his personal ambitions.

"The Court is now looked upon as the sheet anchor. Will it be if its Chief Justice is placed in the political whirlpool? The office has come down to me covered with honor. When I accepted it, my duty was not to make it a stepping-stone to something else, but to preserve its purity and make my own name as honorable, if possible, as that of my predecessors. My whole education and training has been in the line of its requirements. Time and persevering patience, added to my habits of work, may give me honor where I am. The other field is altogether untried. If I should fail there, it would to a certain extent drag my office down with me. No man ought to accept this place unless he takes a vow to leave it as honorable as he found it. There ought never to be any necessity for rebuilding from below. All additions should be from above.

"Think of this, my friend. I appreciate all the kindness of my friends, but ought not the Constitution to have provided that a Chief Justice should not be eligible to the Presidency? If such ought to have been the Constitution, can I with propriety permit my name to be used for the formation of political combination? If I do, can I remain at all times and in all cases an unbiased judge in the estimation of the people? If I am not, shall not I degrade my office? Put these things in your pipe and smoke them and then tell me if you think I ought to permit my name to be used."

John Bassett Moore

by Edwin Borchard

PROFESSOR OF LAW, YALE UNIVERSITY SCHOOL OF LAW

In the month following the victory in the Association's long fight for American acceptance of the compulsory jurisdiction of the World Court, the thoughts of many American lawyers turn to John Bassett Moore, one of the most distinguished Americans who served in that Court, the dean of our international lawyers, great teacher of law, veteran diplomat, prolific author of monumental works on international relationships. Our sketch of him is written by his authorized biographer and close associate for many years. At the age of eighty-five Judge Moore is in good health and intellectual vigor. Without expressing opinion at all as to his mature views on which men deeply differ, the JOURNAL *is pleased, in his "sunset years", to publish this appreciation of his distinguished services to his profession and his country, and to law, justice and peace among Nations. His membership in the American Bar Association dates from 1889.*

John Bassett Moore was born at Smyrna, Delaware, December 3, 1860. His father was a physician and a member of the Delaware legislature. Mr. Moore learned from him how to estimate men and events—a capacity which has stood him in good stead ever since. His mother was Martha Anne Ferguson. Her contribution to the make-up of this rounded personality is shown in part by his frequent reference to her Greek dictionary, with which she presented Mr. Moore on one of his early birthdays. He cherishes that memory to the present day. Possibly to his impartial attendance on the Methodist and Presbyterian Churches he owes his great knowledge of the Bible.

To show that formal academic degrees are no indication of education, the fact may be noted that Mr. Moore never possessed one earned in course. He was educated at Felton Seminary, where he received a thorough classical education, with an appreciation of the arts and foreign languages. His reading was exceedingly profitable, and his memory aided him in acquiring information. It might be added that in later years he was showered with degrees of LL.D. by many universities, who vied with each other in honoring this distinguished personality. His honors from abroad are veritably legion.

From Delaware he went to the University of Virginia, where he seems to have associated with a notable group of men. Ill health caused him to withdraw from the university before he had completed the course. The great influence in his life there appears to have been Professor Thomas R. Price, who was then Professor of Greek and who later went to Columbia as Professor of English. Of him Mr. Moore says: His was "at once a great course in Greek, a great course in Greek History, a great course in Comparative Etymology, and the only course in English I ever had."

Mr. Moore's love for the English language was developed at an early age, but it was especially fostered by the learning of Mr. Price. That style which was admired by numerous Presidents from Cleveland to Wilson was developed in those early days. Mr. Moore records his permanent indebtedness to Professor Price, who had joined the Confederate army.

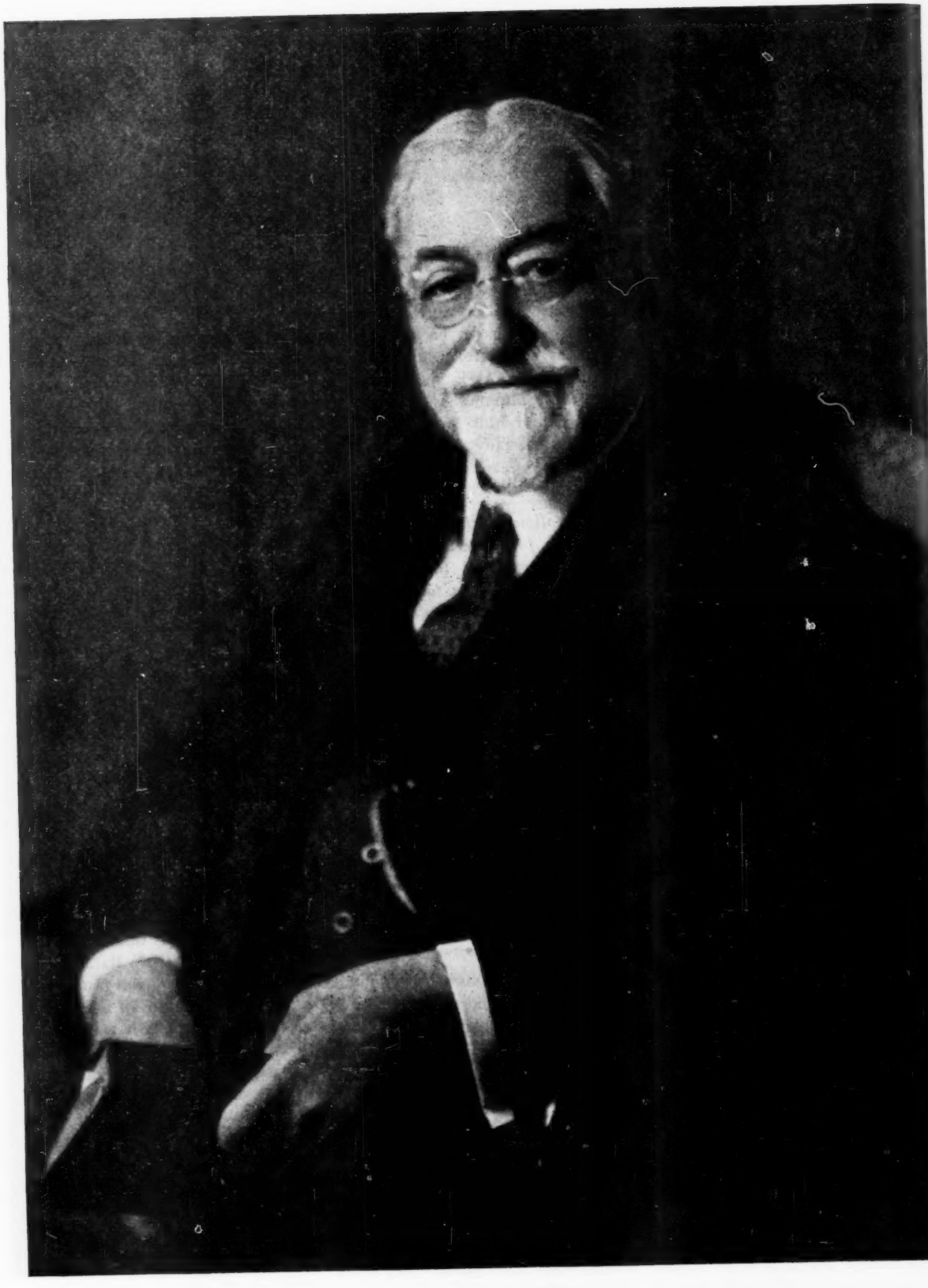
Law Studies with Great Personalities

In Delaware he studied law in the office of his preceptor, Edward Green Bradford.[1] Through him he met the leaders of the Delaware bar, for whom he entertained throughout his life a warm and high regard. He was an intimate of Senator George Gray, who long graced this country's public life. After he was admitted to the Bar on his 23rd birthday, he practised law for a while in Delaware, not without success.

But in 1885 his scholarly instincts induced him to desire to strengthen his education by a study of the civil law. He thereupon applied to Mr. Bayard of Delaware, then Secretary of State, as to the best method of accomplishing this objective. He thought of a part-time position with the American Embassy or Consulate in Berlin, while studying civil law in the rest of his time at the university. Mr. Bayard soon dissuaded him from this course, and urged him to remain in the Department of State. Thus it may be said that sheer accident led him into international law, whose principles he soon developed into a high state of proficiency.

Mr. Eaton, of the then recently established Civil Service Commission, desired that Mr. Bayard subject the candidate to a civil service examination; and, since Mr. Bayard had been

1. Mr. Moore's Memorial Address on Mr. Bradford before the Delaware Bar is printed in Mr. Moore's *Collected Papers*, Vol. VI, pages 310-319.



JOHN BASSETT MOORE

one of the strong proponents of a civil service law, he could not decline. The young candidate passed the examination brilliantly, and was duly appointed by Mr. Bayard as a clerk in the Department of State. It did not take Mr. Bayard long to discover the extraordinary abilities of the young man he had enlisted, and on strict merit Secretary Bayard appointed him at the end of the year to the position of Third Assistant Secretary of State.

His Service in the Department of State

Devoted to the public affairs of his country from the time he entered the Department of State before he had reached the age of 25, until the present day, when at the age of 85 he can look back upon a rich and fruitful life, he has earned by hard work and superior mind his present undisputed eminence as the leading international lawyer of the world. The first essay in his *Collected Papers*, which were published in seven volumes by the Yale University Press in 1945, is a speech he delivered at Felton, Delaware, on July 4, 1877, when he was only sixteen years old. In it he disclosed that splendid mind which, with his other qualities, was his principal asset throughout a long and successful career.

Mr. Moore's skill in draftsmanship and negotiation brought him to a position of leadership in the Department. He soon became an intimate adviser of Secretaries Bayard and James G. Blaine, and of Presidents Cleveland and Harrison. He was made the Secretary of the Fisheries Commission which worked out the so-called Bayard-Chamberlain Treaty and its successive *modi vivendi*, Secretary of the Samoan Commission, and the Department officer in charge of the Bering Sea Fur Seal Arbitration, and had a part in every important diplomatic negotiation of the United States in those years.

A Friend of Men

So far as I can discover, he never talked much about peace or democracy. He merely embodied these virtues in his person. He was on the most friendly terms with every messenger in the Department of State; and every diplomat in Washington sought opportunity to deal with the man, assured of a fair hearing and enlightened consideration. It was no accident that Secretary Bayard leaned with supreme confidence upon this stripling.

I have yet to find among his papers any expression of prejudice against any race, creed, color or country. Quite the contrary, any such sentiment of prejudice would be entirely foreign to his democratic nature.

Scholarly Tendencies Were Manifest

Mr. Moore has written the best account of the dismissal in 1888 of Lord Sackville for intervention in the American election of that year. In fact, his contribution to the public events of the years following 1885 are a running commentary upon American diplomatic history, which it will fructify and enlighten. He was continuously consulted by Presidents and Secretaries of State until 1914. Never a seeker after publicity, he reveled in his function of the man behind the throne.

His scholarly tendencies could not be suppressed. He had been in the Department hardly two years when there appeared the first study on "Extraterritoriality and the Cutting Case," in which Mr. Moore undertook to prove that Mexico could not exercise jurisdiction over an American charged with libel against a Mexican citizen who had committed his offense, if any, in Texas. The argument of that opinion appears again in Mr. Moore's so-called dissenting—really concurring—opinion in the *Lotus* case, decided by the Permanent Court of International Justice in 1924.

In 1889 there appeared his report on extradition, then the most exhaustive study on the subject, to be followed in the year 1891 by his two volumes on extradition, the first devoted to the international phases of the subject, and the second to interstate rendition. This work brought about Mr. Moore's election as an associate member of the Institute of International Law. There is hardly an extradition case that has appeared before the Supreme Court since that day which does not cite Moore's volumes. Articles flowed from his pen in steady profusion.

Moore's Transition to Columbia University

It is unfortunate that such skill and learning cannot remain indefinitely at the disposal of the government. But his contact with George L. Rives, Assistant Secretary of State and a Trustee of Columbia, soon led to the creation at Columbia of the Hamilton Fish professorship of international law and diplomacy. Mr. Moore was called as its first incumbent in 1891.

Both then and in 1893 The President asked him, without avail, to remain in the Department as Assistant Secretary of State.

Arbitration and Negotiations

Before he left, he convinced the Secretary of State that the arbitrations of the United States were an important phase of its diplomatic history, and that they should be disclosed in systematic form to every citizen. He was then commissioned to publish what became a few years later his *History and Digest of International Arbitrations to Which the United States Has Been a Party*. The fifth volume embodies a vast amount of material on foreign arbitrations, and the sixth volume, consisting of maps, discloses the extraordinary industry and keen scholarship of this student of affairs. The six volumes were published by the Government Printing Office in 1898.

Mention should be made of the fact that President Harrison availed himself of Mr. Moore's skill in many intimate negotiations, and that during the summers which he spent in Washington in his studies on the arbitrations, he was a close adviser

and constant companion of Judge Gresham, then Secretary of State, for whom Mr. Moore prepared many important papers. He played an important part in many of the diplomatic incidents of the United States, notably in his contribution to the softening of the Venezuelan notes of President Cleveland, which resulted eventually in an arbitration. He organized in 1896 the first arbitration conference ever held in this country.

Moore's Retainers from Private Clients

Not least important of all the developments of that period was the fact that private clients in various parts of the country soon realized the exceptional practical skill of the man.

In 1890 he married Miss Helen Frances Toland of Philadelphia and began a life of domestic felicity which Mrs. Moore has continued to grace. Three daughters were born of the marriage, all now married, who have enriched his life with numerous grandchildren.

His marriage may have afforded a reason for his taking clients at all. He selected only those cases which appealed to his sense of justice, and from 1891 to 1921, with the exception of his years in the public service, he was deeply involved in legal matters. His fortune came entirely unsolicited, and his fees were exceptionally small. He proved as shrewd a student of financial as of diplomatic matters. Such practical ability could not be allowed to lie fallow.

His knowledge of history as a guide to human conduct was so profound that in 1896 he was offered by Johns Hopkins one of their principal professorships in history. So deep, however, was his devotion to the law that he reluctantly declined the offer. Indeed, his skill in resisting inducements to depart from his cherished career is noteworthy, for he was constantly belabored by opportunities to leave his chosen field. He did, however, deliver some lectures at Johns Hopkins in 1911 which have been published under the title *Four Phases of American Development: Federalism—Democracy—Imperialism—Expansion.*

His Digest of International Law

His *Arbitrations* by no means exhausted his scholarly energies. An Act of Congress was passed in 1897 authorizing him to revise Wharton's three-volume digest of international law. For this he was especially qualified because of his acquaintance with the records of the Department of State. Mr. John Sherman was then Secretary of State, and on his being asked whether any of the records were to be kept secret, Mr. Moore was told that the entire Department records were at his disposal. This is in marked contrast to the present day, when it is felt that we must assume global "responsibilities."

The work on the digest soon proved far more extensive than a revision on Wharton's work; it expanded into an original contribution of eight volumes in which Mr. Moore reposed all his vast scholarship. It appeared in 1906 as *A Digest of International Law*. The volumes stand as a monument to Mr. Moore's learning, and constitute a standing refutation of the unfounded charge of American isolation. Through them the influence of the United States was carried in most exalted form to every corner of the civilized globe.

The Treaty of Peace with Spain

His work on the digest of international law was interrupted in 1898 by his service to President McKinley as Secretary and Counsel of the Commission to negotiate a treaty of peace with Spain. Mr. Moore speaks with high regard of the Spanish negotiators, and it is evident that the negotiations were conducted on a high plane of statesmanship. Mr. Moore drafted practically the entire treaty. He often wishes that Senator Hoar of Massachusetts had been successful in preventing the acquisition of the Philippines, for which the United States paid Spain twenty million dollars. This played its part in our entanglement in the Far East, an entanglement which began with the intervention in Samoa. The art of peace-making seems to have come to an end with the conclusion of the treaty with Spain.

Through an ill-drawn boundary, two of the Philippine islands were left in Spanish possession. Mr. Moore prepared for Secretary Hay a long report on these islands. Their acquisition – the only part of the peace treaty Mr. Moore did not draw – cost the United States an additional $100,000.

Services to American Diplomacy

In 1899 Mr. Moore wrote for Secretary Hay a memorandum in revision of a draft furnished by Lord Pauncefote on an international canal treaty, from which evolved the first Hay-Pauncefote treaty. He spent the summer of 1900 in Washington in close touch with Mr. Hay, for whom he managed the Chinese affair arising out of the Boxer troubles. In that year he also prepared a long memorandum on the purchase of the Danish West Indies, now known as the Virgin Islands.

In 1903 Mr. Moore was asked to serve as agent for the United States in the arbitration held with Santo Domingo on the claim of the San Domingo Improvement Company.

In 1905 he found time to publish a collection of essays, known as *American Diplomacy, Its Spirit and Achievements,* published in 1918 in a second edition as *The Principles of American Diplomacy* (reprinted in his *Collected Papers*).

Mention may be made here of an important memorandum which he wrote in 1903 upon Colombia's recalcitrance in refusing to accept the Hay-Herran treaty and in anticipated justification of Theodore Roosevelt's later recognition of the Panamanian Government, arising out of revolution—an event which led to the construction of the Panama Canal. So greatly did Theodore

Roosevelt admire this memorandum" that it became the basis of his message to Congress, revised by Mr. Moore to an extent which warranted President Roosevelt's statement: The message "is as much yours as mine."

Travel and Service Abroad

Mr. Moore's intensive work over the years since 1900 induced something of a breakdown in 1908, felt particularly in the weakening of the eye muscles. He therefore, upon advice, made a long trip abroad which lasted well into 1909. He acquired on that trip a useful store of information concerning the countries of Europe and the Near East. Hardly had he returned when he began to fulfill an earlier commission to edit the *Buchanan Papers,* in twelve volumes (1908-1911). Between 1902 and 1910 Mr. Moore found time to engage in numerous private cases, notably the Venezuelan Asphalt case. For Foreign Minister Rio-Branco of Brazil, a cherished friend, he settled the Brazilian-Peruvian boundary and the Acre dispute in Bolivia.

In 1910 Mr. Moore served as an American delegate to the Fourth Pan-American Conference at Buenos Aires, to which he made an effective contribution. From there he proceeded to Chile, where he represented the United States at the *Centenario* of that country. In 1912 he was again commissioned to serve as American delegate on the Commission of Jurists at Rio de Janeiro.

A Beloved Teacher of Law

After serving the government he always returned to his teaching obligations. He prepared his lectures carefully. He was so sympathetic to the troubles of others that he was from the beginning a much loved teacher.

Yet only a few men who came into more intimate contact with him derived the fullest benefit of his inspiration. These lucky ones received an extracurricular course in the appreciation of law, men and events they will never forget. In the course of his pedagogical duties, he had to read and correct innumerable dissertations.

Return to the State Department in 1913

In 1913, influenced by his life-long devotion to the public service and yielding to the persuasion of Woodrow Wilson, he was led to rejoin the Department of State as its Counselor, limiting his engagement to one year. He realized that his position would be most uncomfortable, since he was to fortify Mr. Bryan as Secretary of State while at the same time serving President Wilson. Bryan was so often absent from the Department of State on his lecture tours that the affairs of the Department were in fact largely in the hands of Mr. Moore. This necessarily brought him into close contact with President Wilson and through the tact of Mr. Moore he enjoyed pleasant relations both with the President and with Secretary Bryan.

Nevertheless, he could not approve the policy of President Wilson, particularly in Mexico, which resulted in the expulsion of Huerta and led to ten years of civil war in Mexico. For Mr. Bryan he entertained a high regard which grew with time. They remained in correspondence until Mr. Bryan's death.

Mr. Moore is wont to say: "The more I saw of Bryan, the more I thought of him; the more I saw of Wilson, the less I thought of him."

His Estimate of Woodrow Wilson

He has often stated that Wilson was a past master at domestic affairs, which he had studied and with which he was familiar. In foreign affairs he was a neophyte. He knew no international law, and he had little knowledge of diplomacy. The intervention of the United States in foreign countries had its beginning with Woodrow Wilson's determination to oust Huerta, the legally constituted president of Mexico. In this he succeeded, but it led to a policy of intervention which cannot be said to have brought either renown or profit to the United States or peace elsewhere.

During the spring of 1914, after Mr. Moore left the Department, he wrote the brief on the *Fiji Land Claims,* which received the largest of any award from the Mixed Claims Commission, United States and Great Britain, and various briefs for the Standard Oil Company (N. J.) and other clients. The war in 1914, coming as a cataclysm upon the commercial world, brought to Mr. Moore an avalanche of matters requiring attention. Nevertheless, he found time to serve on the New York Chapter of the American Red Cross as well as on the national organization, as chairman of the International High Commission established by the Treasury after the First and Second Pan American Scientific Congress, the first of which he helped to organize, as president of the Pan American Society, and in other public and semi-public capacities.

Moore's Views of World War I

It is perhaps needless to say that Mr. Moore, our greatest expert in foreign affairs, thoroughly disapproved of the policy which led to the war with Germany in 1917, which in turn led to the second war with Italy, Germany and Japan in 1941. He tried as a private citizen to steer Wilson correctly in August 1914, but the latter would not be guided.

The futilities and devices associated with that is called collective security had no attraction for Mr. Moore. While he has no objection to the goal, the handicaps afforded by the means are insuperable. So the Founders thought, although they were unfamiliar with the modern devices of non-recognition and sanctions leading inevitably to war. Mr. Moore has a profound acquaintance with the writings of the Founders. The suggestion currently heard that the theory of collective security was not known to the Founders of this country he regards as fantastic. Such ideas were dismissed by these able men as nebulous and impractical. Apart from the fact that they violate

2. The memorandum is printed in the appendix to Helen D. Reid's monograph on international servitudes (1932), and in the *Collected Papers,* Vol. III, page 182.

all the fundamental conceptions of international relations, not to speak of international law, they are impractical of execution since human nature has not changed in the past 100 years, and national nature even less.

Moore's Views of "Peace by Force"

Shortly after the War of 1914-1918, he recorded his views on peace by force. So appropriate is the essay to the events of the present day that I venture to reproduce part of his remarks:

> Every age shares the supposition that change means progress. If one challenges what is done he is immediately informed that the world has entered upon a new era to which past tests are altogether inapplicable. No delusion could be greater than this nor could anything be more opposed to the lessons of history. Benjamin Franklin most truthfully said that "Experience keeps a dear school," but in so saying he did not intend to undervalue the teachings of experience. On the contrary what he meant was that people were bent upon flouting the lessons of experience, thus incurring the penalties that necessarily result from the disregard of what experience taught.
>
> Nothing could more completely exemplify the tendency just described than the recent obsession regarding the possibility of enforcing peace. This obsession is largely the product and the aftermath of the recent war. In June, 1915, there was formed at Philadelphia a so-called League to Enforce Peace. I happened to occupy the chair at the meeting, but after the platform was adopted, resigned from the organization, fully setting forth my reasons in a letter that has not to this day been answered. The platform was based upon the assumption that when war broke out it would always be able immediately to determine upon the face of things who "began" it or, in other words, who was the "aggressor" and on the strength of this determination, made without investigation of the facts and without publication of the correspondence that had previously taken place between the parties, to proceed to use force against or in other words to make war upon the supposed law breaker.
>
> In spite of the progress this notion has made as the result of propaganda conducted by well-meaning persons from Geneva and other quarters, I do not hesitate to say that an idea more preposterous never was conceived. Not only is it opposed to all the teachings of history but it is contrary to all the manifestations of human nature that daily take place before our eyes. It exalts force to a position in the affairs of men never proposed before and is the very embodiment of what we may call peace imperialism, the essence of which is to make of every breach of international peace a world war.
>
> Inflamed with this imperialistic conception, it is not strange that even pacifists are found to clamor, in the name of peace, for the application of measures that have ordinarily been a prelude to war and will ever continue to be so unless human nature should undergo a radical change, of which there is as yet no sign. Indeed, one of the clearest proofs that no such change has as yet taken place is the prevalent delusion that what has led to war in all previous times will now lead to a state of universal peace.

Change Is Not Synonymous With Progress

I have referred to the tendency to assume that change is synonymous with progress. This is so contrary to all human experience that it may properly be regarded as a manifest absurdity. This is a world of change. Nothing is more notorious than the fact that nations rise and fall even though the fall may not result in an utter collapse. To suppose that change means progress in politics is just as sensible as it would be to maintain that change means continuous and permanent progress in the stock market. Not only is change universal but it is by no means always voluntary. Even the most industrious and conservative farmer is compelled to gamble on the weather. Overproduction as well as underproduction may result in a temporary calamity. Moreover bad times as well as good times have an effect upon the temper, exalt hope and create despair and may stimulate the propensity to war as well as the propensity to keep the peace. In periods of economic depression there is no propensity more marked than the tendency to resort to violence for relief. This tendency has produced international wars as well as civil wars and judging by what has taken place in the world in recent years, it has lost none of its potency in this regard.

The professed advocates of peace delude themselves when they imagine that imperialism in any form will assure the peace of the world. No proposal has as yet been made for an international administration of law and justice comparable with that which exists in every well organized national state, and yet during the nineteenth century after the close of the Napoleonic wars, civil wars, as I have often remarked, were more frequent than international wars and claimed more victims.

Organization of the Nations for Law

This is far from saying that efforts to organize the world for peace should not be made. I have myself often advocated such organization and have even formulated plans for the purpose, but the fundamental principle I have always had in mind was an organization for the making and enforcement of law, and not an organization for the enforcement of peace without regard to law or justice. In the latter part of the nineteenth century when the world was relatively tranquil, the idea of the preservation of peace through the primacy of the great powers became very current. The "old doctrine" of the absolute equality of all independent states before the law was contemptuously pronounced to be "dead," and in its place there was put the "new doctrine" and that the great powers had "by modern international law a primacy among their fellows" which bade fair to develop a central authority for the settlement of all disputes between the nations of Europe. It is a remarkable fact that although this proposal compounded of dogma and prophecy has been so thoroughly discredited by the events, it is the actual foundation of the theory of the League to Enforce Peace and is a perfect example of the fallacy that peace can be preserved by a preponderance of force.

In organizing the world for peace, I have always had in mind an association embracing all the nations of the world, and, by this, I mean an open association of which all the nations would be members, and in which membership would not depend upon selection determined by the favor of certain powers or combinations of powers. This is, so far, the obvious defect of the League of Nations. President Wilson in his speech of September 27, 1918, particularly laid it down as a fundamental condition that Germany should be a member of the League but afterwards assented to the deliberate exclusion or omission not only of Germany but of certain other powers upon whom the governments, dominant in the organization, then looked with disfavor and have not ceased to treat with what Mark Twain

called an "unresponsive toleration." Curiously enough this discriminatory principle found its strongest opposition in the Argentine Republic which, in this respect, exhibited a stronger tendency to preserve the earlier ideals of the United States than the latter itself did.

The League to Enforce Peace

The conception of the League to Enforce Peace finds its expression in Articles 10 and 16 of the Covenant, but it is found in its most extreme and visionary form in Article 10 which requires the League to assure by force the maintenance of existing national boundaries. This provision includes, and, indeed, is designed primarily to assure, the preservation of the boundaries laid down in the treaties of peace by which the war was brought to a nominal end. The tendency of some of these new boundaries to produce future wars is so notorious that continuous efforts have been made by various members of the League and notably by some of the British Dominions to qualify the obligation by limitative interpretations, and resolutions to this effect have been offered and voted upon although they naturally have not achieved unanimity. While Great Britain has joined in a special and supplementary agreement to guarantee the western frontier of Germany, she has declined to enter into an agreement similarly to guarantee the eastern frontier. [She did later.] Moreover, while boundaries often form the subject of dispute there is nothing to indicate that they are more enduring now than they have been during various earlier periods in the world's history. There is hardly a great nation today that does not contain territory which it previously took from some other nation, and the reasons for the appropriation have by no means been confessed to be acquisitive. There are vast regions of the earth today of which the occupation is disputed as well as the right of occupation. The world has not yet reached the stage of determining these questions by paper claims or paper titles. Just as government within the state cannot be maintained solely by speeches and high sounding proclamation, so the surging controversies between nations cannot be thus controlled and determined. The supposition that nations, having no immediate and direct part of material interest in such situations, should, on grounds of peace idealism, undertake to prevent by force a forcible settlement by the immediate parties, is merely to substitute the use of force by some powers for the use of force by other powers with the general disaster that usually results from visionary and false premises.

National vs. International Government

Of course those who advocate such things indulge in their own favor the presumption that they are actuated by motives that are purely peaceful and unselfish but it is worthy of remark that such persons consistently refrain from proposing acts of restitution by their own countries. Forcible changes in international boundaries are not always reversible, nor would the interests of the world always be promoted by attempting to change them.

The only substitute for national government is international government and of all kinds of government this is the worst. It has been tried on numerous occasions and has invariably ended in injury to all concerned. A striking illustration of this fact in our own national experience may be found in the attempt internationally to govern the Samoan Islands.

Making "The World Safe for Democracy"

Not without interest is his comment upon the vain attempt of the United States to "make the world safe for democracy," written in the 1930's in connection with an affair which arose in 1876. He remarked:

> We then still believed in America, particularly meaning the United States, and in its capacity to grow; and although, during the civil war, we had had, as under the circumstances was inevitable, a taste of military dictatorship, the thought that the Congress of the United States ever would, in time of peace, abdicate its functions, and throw vast and unprecedented powers, always deemed to be essentially legislative, into the lap of the President, to be exercised by him as he might deem fit, under such advice as he might see proper to summon or to heed, has never entered the mind of a rational being, either at home or abroad. But no one had then dreamed that the United States would ever so far lose its head and its moorings as to undertake by force of arms to "make the world safe for democracy," and, after incurring vast financial burdens in that vain enterprise, would then succumb to the new illusion that it might grow richer and richer by barring as far as possible the exchange of goods, and lending to a crippled and disorganized world more and more money with which to buy its wares. In 1876 the maxims of the founders still more or less dominated the public minds. The era of phrase-making, of emotional uplift, of shallow nostrums and humbug was still far off.

Elected A Judge of the World Court

To his great surprise in 1921 Mr. Moore found himself elected a judge of the Permanent Court of International Justice. Although this meant a tremendous financial sacrifice, he could hardly decline the honor. Mr. Root had advised his colleagues in Europe that Mr. Moore "would be much more useful than I. He has an accurate mind, great learning in International Law, and practical experience in International affairs. . . ."

Mr. Moore went to Europe and made a notable contribution to the life and work of the Court. In one sense it may be said that he saved the Court when, in the *Eastern Carelia* case, the Court declined the Council's request for an advisory opinion. Russia had failed to furnish any documents to the Court from which the case could be judged and declined to appear. Some of the judges wished to decide the case nevertheless, and the Council of the League actually reprimanded the Court for declining to give the opinion in question.

But Mr. Moore felt that its judicial independence was more important than any advisory function it could perform and time has served to justify his view. Nevertheless, he acquired then a certain realization of the dangers of advisory opinions and felt that the United States should have an opportunity possessed by all other great Powers of resisting the request of the League of Nations for an advisory opinion on any matter in which the United States has or claims an interest. Mr. Moore so advised Senator Walsh of Montana, a strong advocate of the League of Nations. Senator Walsh was impressed, and whether or not the advice played a part in causing the absention of the United States from the first Court, the fact is that the advisory opinion

procedure caused the greatest apprehension.

Further Services to International Law

From December 11, 1922, until February 19, 1923, Mr. Moore presided over the international conference held at The Hague, composed of a Commission of Jurists and their Military and Naval Advisers, for the purpose of formulating a Code of Rules for the regulation of the use of aircraft and of radio in time of war. Unfortunately, the excellent report of this conference was not approved by the governments, the only ones showing an interest in the subject having been Italy and Japan. Had the Code been adopted, it would have prevented some of the devastation wrought by the late war.

In 1924 Mr. Moore was persuaded to republish certain essays, and there then appeared *International Law and Some Current Illusions.* The essays contain a wealth of wisdom and have been incorporated in the *Collected Papers.*

His Retirement from the World Court

In 1924 he resigned from his professorship at Columbia but continued actively in the work of the Court until 1928.

He then felt that the necessity for work on the international adjudications, which was designed to embrace the world's judicial record, and for which the Carnegie Endowment had made the necessary appropriations, warranted his return to the scientific life. Under the head of *International Adjudications, Ancient and Modern, History and Documents,* some seven volumes have appeared, with two more ready for publication. But about 1938 the Carnegie Endowment suspended its appropriation, whereupon this great work was brought to a sudden end.

Since 1928 Mr. Moore has only occasionally been persuaded to handle practical cases, all his remaining creative energies being devoted to the adjudications. He declined to accept a retainer in the *Leticia* case of 1933, from either of the parties, Columbia and Peru, or from neutral Brazil. Yet he advised all the parties in question in the interests of international peace, which has always been his main interest. Although Mello-Franco of Rio de Janeiro finally mediated the conflict, it was done on the basis of Mr. Moore's recommendations. All the parties paid tribute to his practical solutions.

It would not be proper to leave unmentioned his rich fund of humor, which has enabled him to conquer many difficulties. At a meeting of twenty-four directors of the Equitable Life Assurance Society, of which he was one, a vote was taken as to who among their company was the best story teller. Mr. Moore received every vote but his own. His letters are replete with appropriate anecdotes and metaphors.

His Attitude Toward World War II

He found time between 1935 and 1939 to resist in such ways as he could the efforts of the Administration to acquire the power to designate "aggressors" and to embargo commodities in association with other Powers. This he felt would be a direct step toward war, and his apprehensions were not unjustified. Although he helped to prevent the 1936 amendment of the Neutrality Act, he was unable to stem the persistent efforts by the United States to bring about the gradual abolition of neutrality.

Just what value the new policy of universal intervention is to have for the world is unstated. But it could not meet the approval of so experienced an administrator of international law and relations as John Bassett Moore. He was shocked by the unprecedented quest of President Franklin Roosevelt for a third term —not to speak of a fourth—an honor which George Washington declined; and by the departures from tradition and law which "measures short of war" entailed. He knew well where these aberrations would lead.

Speaking of the new effort to substitute the Executive Agreement for the treaty-making power, he expressed, in a letter dated May 4, 1945, a sentiment which has wider implications. He then said:

> Mr. Wallace McClure exemplifies the popular and downward trend in what he says on that subject. His philosophy is that the systematic violation of Constitutional provisions creates a precedent that renders unnecessary the further observance of them. This is the doctrine of nullification in a new and advanced form. The original doctrine involved the question of States' rights as against Federal rights. The present proposal is that the repeated disregard of express constitutional provisions has the effect of amending or supplanting them. Perhaps we might call it the doctrine of supplantation by repeated violation.

Not without reason did John Bassett Moore become the master of internationl law and the acknowledged dean of the profession. Throughout his life he has exhibited a high character, an enviable knowledge of private and of public law and of history, an appreciation of human and national psychology, great industry, the courtesy of an innate diplomat, objectivity, tact, tolerance, deference, and an unusual modesty.

$5000 Increase Voted in Salaries of Federal Judges

The horizontal increase of $5,000 a year in the salaries of all judges of the Federal courts, in an aggressive support of which the American Bar Association joined hands with Attorney General Tom C. Clark and the national Administration, has been passed by the Congress and signed by President Truman. This adds another important item to the impressive list of Association recommendations which have been enacted by the Congress which has ended its sessions in August.

The basic measure was the Hobbs-Wagner bill (H.R. 2181; S. 920), which was endorsed and urged by the House of Delegates on December 19, 1945 (32 A.B.A.J. 242). The JOURNAL presented the factual arguments in support of the fairness and justice of the belated increase ("How to Get and Keep Independent Judges" – 31 A.B.A.J. 630-637; 31 A.B.A.J. 645; 32 A.B.A.J. 213). In reporting the bill favorably, the Senate Committee on the Judiciary noted that it proposed the first increase in the salaries of Federal judges since 1926 and that it was necessary to grant such an increase if competent judges were to be kept on the bench or desirable nominees obtained for vacancies. The Senate Committee thought it was unseemly that Federal judges should be compelled to depend on the acceptance of their magazine articles, the sales of their books, or their labors in teaching night classes in law schools, to augment their salaries.

The Senate passed S. 920 on July 17, and the House of Representatives on July 20 accepted the Senate bill in lieu of its own companion measure (H.R. 2181). The bill was signed by President Truman on July 31, and became Public Law 567. As compared with the bill summarized and advocated in 32 A.B.A.J. 630-637, the only amendments of substance were to include the judges of the District Court of the Virgin Islands and of the Tax Court of the United States; also, to strike out the Section 3, which would have postponed the effective date of the increases until the expiration of the Stabilization Act of 1942. Because of the changes in conditions, the Wage Stabilization Board advised that this was no longer necessary for conformance to national policy.

Uniform Increases for All Judges

More than 300 judges will receive the increase of $5,000 in their annual salaries. The increase will thus cost the taxpayers a little more than $1,500,000 a year. Chief Justice Fred M. Vinson will go up to $25,500 a year; the salaries of Associate Justices of the Supreme Court, to $20,000. Judges of the Circuit Courts of Appeal will receive $17,500 and District Judges $15,000.

These amounts, however, are before taxes. The net salaries of the judges, after the increases, will be approximately the amounts shown in 32 A.B.A.J. 630-637.

Appreciation of the Association's Support

The bill for the increases was actively supported, before the Congress in 1944-45, by the Association's Committee on Judicial Salaries, of which Arthur H. Dean, of New York, was then Chairman. These efforts were continued in 1946 by the present Committee, of which James M. Barnes, of Washington, D. C., has been the effective Chairman.

In behalf of the committee of judges which took part in the presentation in support of the bill, Judge Harold M. Stephens, of the United States Court of Appeals for the District of Columbia, has expressed the hearty thanks of his colleagues for the help given by the Association and the JOURNAL.

Need for Increasing Salaries of Judges of State Courts

The Association's efforts to obtain for Federal judges an increase which will to some extent compensate for the sharp increases in prices and living costs since 1941, have been only a part of the Association's objectives as to judicial salaries. In nearly all of the States, the salaries of judges are even less adequate than they have been in the Federal courts and are substantially below what is required for any recognition of the importance and responsibility of the work of the judges of the State courts.

The substantial increase granted to all Federal judges will give new impetus to the proposals to increase judicial salaries in most of the States, and the Association will redouble its efforts to that end. In the post-war period, the competence and courage of the judges of the State courts are taking on a renewed importance.

As was pointed out in 32 A.B.A.J. 630-637, the same factors as to increased costs of living and the heavy impacts of taxes are operative also as to practicing lawyers, who are generally "in the same boat" as the

(Continued on page 613)

Review of Recent Supreme Court Decisions

by Edgar Bronson Tolman*

Citizenship—Cancellation of Certificate of Naturalization on Grounds of Fraud in Procurement

Knauer v. *U. S.*, 90 L. ed. Adv. Ops. 1195; 66 Sup. Ct. Rep. 1304; 14 U. S. Law Week 4450. (No. 510, argued March 28 and 29, decided June 10, 1946).

Knauer, a native of Germany, and a decorated member of the German Army in World War I, came to the United States in 1925 and settled in Milwaukee. He was naturalized in 1937 after taking his oath of allegiance in which he swore to transfer his allegiance to the United States from Germany. The United States in 1943 instituted proceedings under the Nationality Act of 1940 to cancel his certificate on the ground of fraud in its procurement in that he had falsely and fraudulently represented in his petition that he was attached to the principles of the Constitution and had taken a false oath of allegiance. The District Court was satisfied beyond a reasonable doubt that he had practised fraud when he obtained his certificate. It issued an order revoking the order admitting him to citizenship and cancelling his certificate, which the Circuit Court for the Seventh Circuit affirmed. The Supreme Court granted certiorari, and affirmed.

Mr. Justice DOUGLAS delivered the opinion of the Court. He states that the crucial issue in the case is whether Knauer swore falsely and committed a fraud when he promised under oath to forswear allegiance to the German Reich and to transfer his allegiance to this nation. The standard of proof where denaturalization is sought is strict, he says, and the facts are reexamined to determine if the proof of illegality is "clear, unequivocal, and convincing", not even the concurrent findings of two lower courts being accepted. He gives the reason for this strict test as being that, "Citizenship obtained through naturalization is not a second-class citizenship". Such citizenship carries all the rights of a natural-born citizenship to take part in, criticize, and even promote changes in our laws "including the very Charter of our Government".

Mr. Justice DOUGLAS quotes *Baumgartner* v. *United States* as indicating that "utterances made in years subsequent to the oath are not readily to be charged against the state of mind existing when the oath was administered". After "due regard" of the evidence which antedates Knauer's naturalization, of that which clusters around that date, and of that which follows it, of the various versions of the various episodes, of the testimony and other evidence, and of "the appraisal of the veracity of the witnesses by the judge who saw and heard them . . . , we conclude with the District Court and the Circuit Court of Appeals that there is solid, convincing evidence that Knauer before the date of his naturalization, at that time, and subsequently was a thoroughgoing Nazi and a faithful follower of Adolph Hitler."

Mr. Justice DOUGLAS then proceeds to the question of whether the issue of fraud can be tried in this case. The argument was that the oath satisfied the court of naturalization and that therefore the issue of fraud is res judicata. He answers by saying that the oath is in a different category and that it relates to a state of mind and is a promise of future conduct,—that it comes after the matters in issue have been resolved in favor of the applicant for citizenship. "Hence, no opportunity exists for the examiner or the judge to determine if what the new citizen swore was true, was in fact false. Hence, the issue of fraud in the oath cannot become *res judicata* in the decree sought to be set aside."

He further states that Congress has provided that fraud is a basis for cancellation of certificates of naturalization and that, "We have no doubt of the power of Congress to provide for denaturalization on the grounds of fraud". To hold otherwise, he says, would put a premium on the successful perpetration of frauds against the nation.

Mr. Justice DOUGLAS closes his opinion as follows: "We adhere to the prior rulings of this Court that Congress may provide for the cancellation of certificates of naturalization on the grounds of fraud in their procurement and thus protect the courts and the nation against practises of aliens who by deceitful methods obtain the cherished status of citizenship here, the better to serve a foreign master".

Mr. Justice BLACK delivered a short concurring opinion in which he re-emphasizes the position that philosophical or political beliefs could not be the basis for such a judgment. He further states that he is "unable to say that Congress is without Constitutional power to authorize courts

* Assisted by JAMES L. HOMIRE; labor case by E. J. Dimock, member of the Board of Editors.

after fair trials like this one, to cancel citizenship obtained by the methods and for the purposes shown by this record".

Mr. Justice RUTLEDGE delivered a dissenting opinion. He admits that Knauer committed the fraud charged but argues that since native-born citizens could have acted and thought just as Knauer did without danger of losing their citizenship, to denaturalize Knauer for those acts is to make his citizenship and that of other naturalized citizens, to be second-class citizenships. Against that classification he protests. T.

The case was argued by Mr. Ode L. Rankin for Knauer, and by Mr. Frederick Bernays Wiener for the United States.

Race Discrimination—State Legislation Imposing Burdens on Interstate Commerce

Morgan v. *Commonwealth of Virginia,* 90 L. ed. Adv. Ops. 982; 66 Sup. Ct. Rep. 1050; 14 U. S. Law Week 4395. (No. 704, argued March 27, decided June 3, 1946).

Irene Morgan, a negress, was traveling interstate on a bus in Virginia when she was asked to, and refused to, move to a different seat in accordance with a statute of Virginia which required segregation of the races in motor buses. She was arrested and convicted of a misdemeanor. The conviction was affirmed by the Court of Appeals of Virginia. She then appealed to the Supreme Court of the United States questioning the constitutionality of the Virginia statute as being repugnant to the Commerce Clause of the Constitution. The judgment of the Virginia Court was reversed. Mr. Justice REED delivered the opinion of the Court.

He states that the precise degree of a permissible restriction on state powers, while not generally fixed, can be tested by an abstract principle, that being, "Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation". He further states that it is well settled "that, even where Congress has not acted, state legislation or a final court order is invalid which materially affects interstate commerce". And, he says, the State cannot interpose the apologetics of the police power to avoid the operation of this rule. Mr. Justice REED then proceeds to clarify what is the "burden" in this case. "An interstate passenger must if necessary repeatedly shift seats while moving in Virginia to meet the seating requirements of the changing passenger group." This re-seating would be very disturbing, he states, on interstate journeys. He takes notice of the different treatments given this problem by the various states and declares in closing, "It seems clear to us that seating arrangements for the different races in interstate motor travel require a single, uniform rule to promote and protect national travel. Consequently, we hold the Virginia statute in controversy invalid."

Mr. Justice RUTLEDGE concurred in the result.

Mr. Justice FRANKFURTER delivered a short concurring opinion in which he states that for him *Hall* v. *DeCuir,* decided nearly seventy years ago, is controlling. While disclaiming a need for a blanket rule for the country, he declares that a "crazy-quilt" of state laws would burden commerce unreasonably.

Mr. Justice BLACK also delivered a concurring opinion in which he says that although he believes that the courts cannot regulate commerce, and that their doing so makes them a "super-legislature", the Court has seemed committed to the "undue burden" formula in recent years and "in view of the Court's present disposition to apply that formula," he concurs.

Mr. Justice BURTON delivered a dissenting opinion. He states that the undue burden is established by noting the lack of uniformity between the Virginia statute and those of other states on the same subject. If that makes this statute invalid, he says, then it probably makes the statutes of the other states invalid because they differ from each other. He states that, "The present decision will lead to the questioning of the validity of statutory regulation of the seating of intrastate passengers in the same motor vehicles with interstate passengers." And the decision may lead to increased lack of uniformity. He further maintains that there are not sufficient findings of fact to establish an undue burden and so there is no "sure basis" for an informed judgment by the court.

Mr. Justice BURTON then states that since so many states differ so widely in their treatment of the problem, and since Congress has not acted on it there "is evidence against the validity of the assumption by this Court that there exists today a requirement of a single uniform national rule on the subject." He closes with the statement, "Uniformity of treatment is appropriate where uniformity of conditions exists." T.

The case was argued by Mr. Thurgood Marshall and Mr. William H. Hastie for Irene Morgan and by Mr. Abram P. Staples, Attorney General of Virginia, for the Commonwealth of Virginia.

Sherman Anti-Trust Act—Efforts to Obtain Power to Exclude Competition and the Existence of that Power Come Within the Ban of the Sherman Act Without Showing Exercise of that Power—Evidence of Concerted Action to Fix Prices Sufficient to Prove Attempt to Monopolize

American Tobacco Co., et al. v. *U. S.,* 90 L. ed. Adv. Ops. 1095; 66 Sup. Ct. Rep. 1095; 14 U. S. Law Week 4409. (Nos. 18-20, argued November 7 and 8, 1945, decided June 10, 1946).

The American Tobacco Co., Liggett & Myers, R. J. Reynolds Tobacco Company and certain officers, affiliates and agents were convicted by a jury in the District Court of the U. S. for the Eastern District of Kentucky for violating the Sherman Anti-Trust Act. Each of the companies was convicted on counts of conspiracy in restraint of trade, monopolization, attempt to monopolize and conspiracy to monopolize. The Circuit Court of Appeals, Sixth Circuit af-

firmed each conviction. The Supreme Court granted certiorari, but limited the petitions to the question, "Whether actual exclusion of competitors is necessary to the crime of monopolization under Section 2 of the Sherman Act." The Supreme Court affirmed the judgment of the Circuit Court. Mr. Justice BURTON delivered the opinion of the Court.

He states that the issue is raised by instructions to the jury defining "monopoly", the important parts of which follow. "Now, the term 'monopolize' . . . means the joint acquisition or maintenance by the members of a conspiracy formed for that purpose of the power to control and dominate interstate trade and commerce in a commodity to such an extent that they are able, as a group to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power. . . . An essential element of the illegal monopoly or monopolization charged in this case is the existence of a combination or conspiracy to acquire and maintain the power to exclude competitors to a substantial extent. Thus you will see that an indispensable ingredient of each of the offenses charged in the Information is a combination or conspiracy."

Mr. Justice BURTON states his assumption that such a combination or conspiracy, which is called an "indispensable ingredient in the offenses charged", has been established. The issue here, he then says, is: "Do the facts called for by the trial court's definition of monopolization [i. e., not calling for proof of an "actual exclusion" of competitors] amount to a violation of Section 2 of the Sherman Act?" Before proceeding to that issue, however, he answers the contention of the tobacco companies that to convict them of a conspiracy to monopolize trade amounts to double jeopardy—that in fact there is only one conspiracy. He says that, "we have here separate statutory offenses, one a conspiracy in restraint of trade that may stop short of monopoly, and the other a conspiracy to monopolize that may not be content with restraint short of monopoly. One is made criminal by Section 1 and the other by Section 2 of the Sherman Act."

Mr. Justice BURTON then proceeds to examine the evidence and shows by a lengthy analysis of it how the three tobacco companies seemed to work in complete accord to set grades of tobacco in the markets, to set the top prices which those grades brought in the market, and to raise and lower prices of their cigarettes at the same time and in the same amount in order to compete effectively with companies producing lower priced cigarettes. From the evidence he shows that the three companies have control of the vast majority of cigarette business and revenue. This evidence was sufficient for the circuit court to find that the verdicts of the jury were sustained by sufficient evidence on each count.

Mr. Justice BURTON then proceeds to "the one question remaining" which is "whether actual exclusion of competitors is necessary to the crime of monopolization in these cases under Section 2 of the Sherman Act." He shows that the Act of Congress defines several offenses; combinations and conspiracies to stifle competition and encourage monopoly; attempts to produce those results; and monopolization. It thus appears that proof of actual exclusion of competitors is not necessary on a prosecution for monopolization under Section 2 of the Sherman Act.

Mr. Justice FRANKFURTER, while entirely agreeing with the judgment and opinion in these cases, "would have enlarged the scope of the orders allowing the petitions for certiorari so as to permit consideration of the alleged errors in regard to the selection of the jury." T.

Mr. Justice REED took no part in the consideration of these cases.

The cases were argued by Mr. George W. Whiteside and Mr. Milton Handler for Reynolds Tobacco Co., by Mr. Bethuel M. Webster for Liggett & Myers, and by Mr. Harold F. McGuire for R. J. Reynolds; by Mr. Assistant Attorney General Berge for the Government.

Veteran's Priority Rights—Declaratory Judgment—Res Judicata—Right of Intervention

Fishgold v. *Sullivan Drydock and Repair Corp. et al.*, 90 L. ed. Adv. Ops. 961; 66 Sup. Ct. Rep. 1105; 14 U. S. Law Week 4364. (No. 970, argued May 6, decided May 27, 1946).

Fishgold was employed by the Sullivan Corporation before he entered the Army in 1943, and upon discharge applied for and received reemployment in the same position under the terms of the Selective Service Act of 1940. When the amount of work for the company decreased Fishgold was laid off for short periods although non-veterans senior to him in employment service were allowed to work at the same type of work, pursuant to a collective bargaining agreement between the union and the corporation. Fishgold brought action to obtain a declaratory judgment as to his rights under the Act and to obtain compensation for the days he was not allowed to work. The union was allowed to intervene. The District Court refused the declaratory judgment but entered a money judgment for Fishgold for the days lost. Only the union appealed and the Circuit Court of Appeals, Second Circuit, reversed. The Supreme Court granted certiorari and affirmed the judgment of the Circuit Court. Mr. Justice DOUGLAS delivered the opinion of the Court.

He first answers the claim that the union had no appealable interest since relief was granted only against the corporation by saying that, since the District Court interpreted the collective bargaining agreement with both the corporation and the union parties to the suit, should the union ever thereafter institute a new suit for an interpretation of the agreement, a plea of res judicata would be sustained. He further states that, "here the rights of the union and its members under a contract with the corporation were adjudicated in a proceeding in which the union was a party. The contract was still in existence at the time of the appeal. Hence the case was not moot, and the

only way the union could protect itself . . . [against the adverse judgment] was by an appeal." As to the contention that this appeal burdens Fishgold with the costs, Mr. Justice DOUGLAS declares that under the Rules of Civil Procedure (Rule 54-(d)) the Court can direct otherwise than their allowance to the prevailing party.

Mr. Justice DOUGLAS then turns to the merits of the case and explains the purpose of the Act to protect the veteran in several ways, the important one here being that he "shall not be discharged from such position [his pre-service position] without cause within one year after such restoration." Fishgold contends that the "discharge", from which he is protected, includes "lay-offs" but Mr. Justice DOUGLAS declares that he can find no support for that contention in Section 8 (b) of the Act which restores him to his former position or to a "position of like seniority". Nor can he find support for that contention in Section 8 (c) which provides that he "shall be so restored without loss of seniority". What the veteran seeks here is a "step-up" in seniority, says Mr. Justice DOUGLAS. "But the guarantee against discharge does not on its face suggest the grant of a preference to the veteran over and above that which was accorded by the seniority of 'such position'." He then declares that in no normal sense is a "lay-off" a discharge and where a "lay-off" was required by a slackening of work, the veteran could be laid off if the operation of the seniority system which the veteran re-entered with all his old rights, required it. "We have searched the legislative history in vain for any statement of purpose that the protection accorded the veteran was the right to work when by the operation of the seniority system there was none then available for him."

Mr. Justice BLACK delivered a dissenting opinion in which he declares his belief that the judgment of the Circuit Court of Appeals should be reversed and the case remanded to it with directions to dismiss the appeal for want of jurisdiction, the union not being a proper party to appeal. He claims that the judgment of the District Court would not be res judicata between the union and anyone else but Fishgold because Fishgold was the only adverse party. He believes further that the union would never have to contend with "the harsh doctrine of collateral estoppel" which the Supreme Court has never adopted and which has been adopted only in a few state jurisdictions. He says, "In my opinion the union would not have been barred by the trial court's judgment. It was therefore not an aggrieved party and not entitled to appeal. . . . This case illustrates the wisdom of the practice which permits parties to settle their own lawsuits without intervention by others interested only in precedents." T.

The case was argued by Mr. John F. Sonnett, Assistant Attorney General, for Fishgold and by Mr. J. Read Smith for the Corporation.

Criminal Law — Venue — Selective Training and Service Act

United States v. *Anderson*, 90 L. ed. Adv. Ops. 1124; 66 Sup. Ct. Rep. 1213; 14 U. S. Law Week 4416. (No. 447, argued March 26, decided June 10, 1946).

The sole issue here is whether in a criminal prosecution under the Selective Training and Service Act, for refusal to submit to induction, "the venue is properly lain in the judicial district where the act of refusal occurred rather than in the district where the draft board . . . is located."

Mr. Justice RUTLEDGE delivered the opinion of the Court. He said that venue was properly laid where the act of refusal took place. T.

The case was argued by Mr. Nathan T. Elliff for the Government and there was no appearance for Anderson.

Admiralty—Jones Act—Injured Seaman's Right to Jury Trial of Action Against Line Acting as "General Agent" of War Shipping Administration

Hust v. *Moore-McCormack Lines, Inc.*, 90 L. ed. Adv. Ops. 1220; 66 Sup. Ct. Rep. 1218; 14 U. S. Law Week; (No. 625, argued April 22, 1946; decided June 10, 1946).

Petitioner, a seaman employed on a Government-owned Liberty ship operated under a so-called General Agent Service Agreement between respondent steamship line and the War Shipping Administration, obtained a verdict against the line from a jury in the Circuit Court for the County of Multnomah, State of Oregon, for injuries alleged to have arisen from the negligence of the line. The judgment on the verdict was reversed by the Supreme Court of Oregon (— Ore. —, 158 P. 2d 275) on the ground that the Jones Act (Section 33, Merchant Marine Act of 1920, 46 U.S.C. § 688), under which the suit was brought and which permitted suit only by employee against employer, was not applicable since the line was not the seaman's employer. The Supreme Court reversed.

Mr. Justice RUTLEDGE delivered the opinion of the Court holding that the war-time transfer of the shipping industry to temporary governmental control did not reduce the employees to the single mode of enforcement by the Suits in Admiralty Act (41 Stat. 525, 46 U.S.C. § 741) which, among other differences from the Jones Act, does not afford jury trial. He further states that Section 1 of the so-called Clarification Act (50 U.S.C. App. § 1291) was effective to prevent the loss of the rights asserted by the seaman.

Mr. Justice DOUGLAS with whom Mr. Justice BLACK agreed, rendered a concurring opinion, besides joining in the opinion of the Court. He states that, under common law principles, the line was the employer.

Mr. Justice REED, with whom Mr. Justice FRANKFURTER and Mr. Justice BURTON concurred, rendered a dissenting opinion. D.

The case was argued by Mr. B. A. Green for Hust and by Mr. Erskine Wood for McCormack Lines, Inc.

Proposed Amendments to the Constitution of the American Bar Association

To be presented and acted upon at its sixty-ninth Annual Meeting at Atlantic City, New Jersey, October 28-November 1, 1946.

To the Members of the American Bar Association and of the House of Delegates:

I.

Notice is hereby given that Howard L. Barkdull of Cleveland, Ohio, Charles M. Lyman of New Haven, Connecticut, George M. Morris of Washington, D. C., William L. Ransom of New York City and W. E. Stanley of Wichita, Kansas, members of the Association and members of the Committee on Rules and Calendar of the House of Delegates, have filed with the Secretary of the Association the following amendments to the Constitution of the Association:

(1) Amend Article IV, Section 3 of the Constitution by:

1. Striking after the word "elect" in line 2 the words "four members of" and substituting therefor the following: "five members of the Association as Assembly Delegates to".

2. Striking the word "second" in line 7 and substituting therefor "third".

3. Striking all of lines 14, 15, 16, and 17, so that Section 3 as amended would read as follows:

Section 3. Assembly Delegates.—At each annual meeting the Assembly shall elect five members of the Association as Assembly Delegates to the House of Delegates, no two of whom shall be residents of the same State. Election shall be by a plurality vote of the Assembly for a term, which shall commence at the adjournment of the annual meeting at which such delegates are elected, and shall expire at the adjournment of the third annual meeting following their election. If an Assembly Delegate shall fail to register in attendance by twelve o'clock noon on the opening day of an annual meeting, the office of such delegate shall be deemed to be vacant; and thereupon the Assembly shall elect a successor to serve for the remainder of the term.

(2) Amend the Constitution by inserting as Article V a new article to read as follows:

ARTICLE V
Regional Meetings

Section 1. Regional Meetings of the Association may be held each year at such times and places, and serving such areas as the Board of Governors shall designate. All arrangements for these meetings shall be under the supervision and control of the Board of Governors.

Section 2. Notice of regional meetings shall be announced at least thirty (30) days prior to the date set through publication in the AMERICAN BAR ASSOCIATION JOURNAL. Such additional notice as may be determined by the Board of Governors shall be given by the Secretary to the members of the Association in the regions where the meetings are to be held.

Section 3. The President of the Association shall be the presiding officer of each regional meeting and is authorized to appoint such committees as may be required for the conduct of the business of the regional meeting.

Section 4. Each regional meeting may take such action as it deems appropriate within the stated purposes of the Association and such action shall have effect as the expression of the members of the Association present at such meeting, and as a recommendation to the House of Delegates and the Assembly. The action taken shall be reported to the next meeting of the House of Delegates and Assembly in the form of appropriate resolutions and shall not be binding upon the Association until it shall have been approved by the House of Delegates.

Amend Articles V, VI, VII, VIII, IX, X, XI, XII and XIII, by changing the numbers thereof to numbers VI, VII, VIII, IX, X, XI, XII, XIII and XIV respectively.

(3) Amend the Constitution by inserting in existing Article V, as Section 7, a new section to read as follows:

Section 7. Selection of Section Delegates.

Each Section of the Association shall be entitled to one delegate in the House of Delegates. At the annual meeting in each even-numbered year, each Section shall elect from its membership a delegate to the House of Delegates. He shall serve for a term of two years ending with the adjournment of the annual meeting of the Association in the next even-numbered year. In the event of the resignation, disqualification or death of a Section Delegate, the Council of the Section which he represents shall select and certify his successor for the balance of his unexpired term.

Amend existing Article V by changing the numbers of Sections 7, 8, 9, 10 and 11 to numbers 8, 9, 10, 11 and 12 respectively.

(4) Amend existing Article VI, Section 2 of the Constitution by striking out the entire section in present form and in lieu thereof inserting the following:

Section 2. Meetings. The Board of Governors shall meet immediately prior to each meeting of the House of Delegates and shall hold not less than two additional meetings in each Association year. In no event shall the interval between meetings of the Board be greater than four months. Special meetings may be held at the call of the President and shall be called by the Secretary upon the request of three or more members of the Board.

At any meeting a majority of the Board shall constitute a quorum.

(5) Amend existing Article IX, Section 1 of the Constitution by inserting after line 20, the enumeration of two new Sections, as follows:

Section of Administrative Law.
Section of Labor Relations Law.

II.

Notice is also given that the aforesaid members of the Association and of the Committee on Rules and Calendar of the House of Delegates have filed with the Secretary of the Association the following amendments to the By-Laws of the Association:

(1) Amend Article V, Section 2 of the By-Laws by striking out the entire section in present form and in lieu thereof inserting the following:

Section 2. Resolutions.

(1) Every resolution offered for consideration in the Assembly shall be in writing and shall be concise in form. The Resolutions Committee, unless it finds and reports its reasons for doing otherwise, shall require the proponent of any resolution to revise and condense it, if need be, so that as reported, including the preamble, it does not exceed three hundred words.

(2) At any time between annual meetings, any member of the Association may file with the Chairman of the Resolutions Committee any resolution of the character prescribed in Article IV, Section 2 of the Constitution, for the consideration of the Committee and a report by it to the Assembly. During an annual meeting, any member of the Association may offer such a resolution only from the floor and only at the first session of the Assembly. At such first session, the Chairman of the Resolutions Committee shall bring to the attention of the Assembly the nature of the resolutions theretofore filed with him.

(3) Unless a resolution presented in the Assembly is offered by a Section or Committee of the Association, or in connection with the consideration of a report by a Section or Committee, such resolution shall be referred by the Chair, on presentation and without debate, to the Resolutions Committee for hearing, consideration and report to the Assembly.

(4) If a resolution filed by a member of the Association with the Resolutions Committee, or offered from the floor of the Assembly, proposes or opposes legislation, the proposal shall be accompanied by ten copies of the bill or by ten copies of a summary of its provisions.

(5) If a question arises as to whether or not a resolution is within the scope of the objects and purposes of the Association, the Resolutions Committee shall report to the Assembly its opinion on that question, and also upon the advisability of adopting the resolution. The opinion of the Committee upon the question shall be and stand as the opinion of the Chair, unless an appeal therefrom is taken by any member, in which event the decision of the Assembly shall be by a vote of the members present.

(6) Only resolutions which are reported favorably by the Resolutions Committee or are adopted by the Assembly need to be published in the proceedings of the meeting.

(2) Amend Article XII, Section 1 of the By-Laws by adding at the end thereof the following:

No Section shall hold a regular or special meeting otherwise than at the time and place of the annual meeting, unless authorized by the Board of Governors.

Amend Article XII, Section 3 of the By-Laws by adding at the end thereof the following:

No Section By-Laws shall provide for or permit any class of membership except among members of the American Bar Association.

(3) Amend Article XII of the By-Laws by adding thereto a new section as follows:

Section 7. Meeting of Section Chairmen.

A meeting of Section Chairmen shall be held not later than sixty days after each annual meeting of the Association, at the time and place prescribed by the Board of Governors. If the Board of Governors shall fail to call the meeting of Section Chairmen and to specify the time and place thereof, the Secretary shall take such action.

III.

Notice is given to the members of the House of Delegates that the aforesaid members of the Committee on Rules and Calendar of the House of Delegates have filed with the Secretary of the Association the following amendments to the Rules of Procedure of the House of Delegates.

A. The following proposed amendments to the Rules of the House, numbered 1-9, inclusive, are required if the proposed amendment, concerning selection of Section Delegates (Constitution, Article V, Section 7, numbered I. (3) above) is adopted.

(1) Amend Rule I, Paragraph 1, by inserting in line 8, after the words "Chairman of a", the words "Section and".

(2) Amend Rule I, Paragraph 3, by inserting in line 6, after the word "each", the words "Section and".

(3) Amend Rule I, Paragraph 6, by inserting in line 7, after the word "Chairmen", the words "of Sections and".

(4) Amend Rule III, Paragraph 2, by substituting in line 4 the figure 8 for the figure 7.

(5) Amend Rule III by striking out all of Paragraph 6.

(6) Amend Rule VII, Paragraph 2, by inserting in line 1, after the words "Chairman of a", the words "Section or".

(7) Amend Rule VII, Paragraph 2, by inserting in line 6, after the words "Chairman of a", the words "Section or".

(8) Amend Rule VII, Paragraph 2, by inserting in lines 10 and 11 after the word "his" in each instance, the words "Section or".

(9) Amend Rule VII, Paragraph 3, by changing the word "Chairman" to "Chairmen", in line 7, and by inserting after the word "of", in line 7, the words "Sections or of".

B. Amend Rule X by striking out all of Paragraph 1 (d) and in lieu thereof inserting the following:

(d) ***The Committee on Hearings***, which shall consist of seven members shall have the duty, upon reference by the House or the Chairman thereof, of holding hearings upon any matter on which non-members of the House ask an opportunity to present their views. The Committee shall designate the time and place (which may be at any time during the year) at which the Committee will hold a requested hearing and shall give notice reasonably in advance thereof to the person, or persons, requesting that hearing. The Committee, upon its own initiative, may invite any person to at-

tend any hearing conducted by the Committee. The Committee shall file its report and recommendations on any hearing with the Chairman of the House. If the House is in session, or is about to meet, when such report is made, the report shall be calendared for prompt consideration by the House. If the House is not in session, or about to meet, when the Committee's report is filed, the Chairman of the House, in his discretion, may cause copies of such report to be distributed to the members of the House for consideration at its next meeting.

IV.

Cuthbert S. Baldwin, Oscar J. Brown, Tappan Gregory, Frank C. Haymond, George M. Morris, John M. Niehaus, Lyman M. Tondel, Loyd Wright, and Willis Smith, members of the Association and of its Special Committee on Public Relations, give notice of their intention to present to the Assembly and the House of Delegates of the Association, in accordance with the provisions of Article XI of the Constitution, the following resolution:

1. *Resolved:* that the Assembly and House of Delegates of the American Bar Association adopt the following amendments to the By-Laws of the Association:
   A. Amend "Article X — Committees", Section 1, (page 34) by inserting immediately after line 20 the following:

      "On Public Relations, to consist of five members and, *ex officio*, the President, the Chairman of the House of Delegates and a representative of the persons in charge of publishing the periodical, or periodicals, of the Association, and the Director, or equivalent officer of the "Public Information Program". The five members of the Committee who are not *ex officio* shall be appointed, in 1946, for terms of one, two, three, four and five years respectively. Thereafter one member of the Committee shall be appointed at the end of each Association year for a term of five years. In the event of a vacancy in membership on the Committee, resulting from any cause other than the expiration of a term, a successor shall be appointed to the vacant membership only for the unfinished part of the unexpired term thereof."

   B. Amend the By-Laws of the Association "Article X—Committees", (page 38) by inserting, directly after line 53, the following:

      "Section 13. Committee on Public Relations. The Committee on Public Relations shall prepare and report to the House of Delegates from time to time plans for advancing public acceptance of the purposes expressed in the Constitution of the Association as implemented by the House of Delegates. The Committee shall have the responsibility for giving effect to plans so presented which are approved by the House of Delegates or, when the occasion may require, by the Board of Governors."

ADMINISTRATIVE PROCEDURE ACT

(Continued from page 551)

and in every other section of the Act. For example, section 4 prescribes procedures for rule making, whereas section 5 relates to procedures in certain fields of adjudication.

"Informal" and "Formal" Procedures

The second fundamental distinction in the Act is that between procedures where legislative or judicial functions are exercised by agencies without a hearing and those in which other statutes require hearings. The former are often called "informal" procedures, the latter "formal". The Act does not define "informal" and "formal" procedures but simply makes additional provisions for situations in which, in conferring administrative powers, Congress has by statute provided that they be exercised upon opportunity for a hearing. Here again the committee reports and the debates emphasize that no hearings are provided by the Act (save in the case of removals of examiners; see section 11) unless other legislation already does so in the type of case involved (Senate Committee Report, pages 7-8; House Committee Report, page 17; *Congressional Record*, pages 2193, 5754).

With respect to hearings, the scheme of the Act is simply this: In the case of the "rule making" or legislative function of agencies, public procedures short of a hearing are provided except where other statutes require a hearing (section 4 (b)). In the case of "adjudication" or the judicial function of administrative agencies, various provisions are made where agencies are by other statutes required to proceed upon opportunity for hearing (see section 5 and particularly subsection (b) thereof) and in other cases (where for lack of the requirement of a hearing only "informal" procedures apply) the administrative operation is governed by sections 6(a) and (d) as well as section 11 relates to the appointment ing or adjudication a statutory hearing is provided, sections 7 and 8 prescribe procedural requirements and section 9. Finally, where in rule mak- and tenure of examiners therefor.

Other Considerations

There are, of course, many other distinctions and applications or exemptions in the Act within the subjects of rule making and adjudication, whether or not in either case a "formal" or statutory hearing is required by law. In rule making, for example, there is the distinction between "general" and "particular" rules. In adjudication there is the differentiation of "licensing", which is further differentiated in some provisions where "applications for initial licenses" are involved. These, however, are to be understood, as stated above, only after the two primary distinctions are fully appreciated.

"BOOKS FOR LAWYERS"

(Continued from page 563)

though he practiced law only during brief interludes between his other multifarious activities, Aaron Burr alone disputed his leadership of the New York Bar.[8] It was a profound lawyer as well as a far-seeing statesman who conceived and maintained the doctrine of implied powers. No one had a higher opinion of Hamilton's ability as a lawyer than Chancellor Kent, who "was to consider him all through life as the greatest lawyer and greatest man he had ever known" (pages 415-416).[9]

My one regret is that Mr. Schachner has not expanded his admirable study into a definitive biography. Perhaps there is yet time. At Princeton Dr. Julian P. Boyd, while editing the complete letters and papers of Thomas Jefferson, is, I hope, planning a definitive biography of Jefferson. At William and Mary Professor Douglass Adair, is at work on another of James Madison. If Mr. Schachner, Dr. Boyd and Professor Adair would confer and compare notes, and if each would publish at approximately the same time a definitive biography of his subject, it would be an epochal event in American historical scholarship.

WALTER P. ARMSTRONG
Memphis, Tenn.

INTERNATIONAL LAW. *By Georg Schwarzenberger. In three volumes. Volume I: International Law as Applied by International Courts and Tribunals. London: Stevens & Sons, Limited. £3. Pages xliv, 645.*

When a lawyer finds it necessary to brush up on his international law and to discover what principle governs the perplexing case sent by a client, he picks up the biggest volume in sight, wades through the index, finds a reference (sometimes), opens the proper page, reads the relevant passage in the text, finds it ambiguous, discovers with relief a string of references at the bottom of the page—and gets the surprise of his life. The references are not to decisions of an international court! First, there are the references to numerous letters from the Secretary of State to Mr. X, the Mexican Minister, and to Mr. Y., the American Minister at Quito. Second, a treaty is cited— between Guatemala and Italy. Third, there is a decision of the Court of Cassation of France; but the Federal Tribunal of Switzerland seems to hold a different view. Fourth, something more familiar—an opinion by the Attorney-General. If he is lucky, he might find also a decision of the Supreme Court of the United States.

The lawyer is thus confronted with the problem of what is the respective legal value of these materials; perhaps it is not worth while to check some of those citations. If our lawyer is patient enough to turn now to the beginning of the book and to read about the sources of international law, he will find that these materials are only expressions of local practice, and that to prove the existence of a rule of international law it is necessary to show that it has been accepted not by one state but by a large number of states. He will be also gratified to find that his first reaction was justified, and that his research would have been more fruitful if he had found a reference to a decision of an international court. A glance through the footnotes will show him that there are international courts, but that their decisions are submerged in the great mass of heterogenous materials. At that moment he might wish that somebody would write a book which would separate these true international decisions from the other acts and documents which, at best, prove only that one state, or a group of states, is ready to consider a certain rule as binding.

Attempts have been made in the past to provide such a book. The collection of sources of international law edited by Professor V. Bruns under the title *Fontes Iuris Gentium* includes two volumes devoted to the decisions of the Permanent Court of International Justice and the Permanent Court of Arbitration. In that collection, excerpts from decisions are grouped systematically, without any connecting narrative. Professor Karl Schmid made an attempt in 1932 to broaden the *dicta* of the Permanent Court of International Justice into general principles of international law. Among the pioneers in this field may be mentioned also W. E. Beckett and H. Lauterpacht, who succeeded in awakening the legal profession to the contribution made by the Permanent Court of International Justice towards the crystallization of many rules of international law.

Professor Schwarzenberger went one step further. He has digested not only the eighty decisions of the Permanent Court of International Justice and the twenty decisions of the special tribunals created within the framework of the Permanent Court of Arbitration, but also some 300 decisions of international claims commissions and mixed arbitral tribunals. He has threaded these decisions into a systematic presentation of the principles of international law, has added a running commentary, and has provided a compendium of jurisprudence free from extraneous non-judicial matter.

Here is a book that ought to appeal to American lawyers, as it makes it easy to ascertain whether there exists an authoritative pronouncement on a particular point. But there are also some drawbacks to this method. Many questions have not come up as yet before an international tribunal, and in such cases resort to an old-fashioned national treatise will still be necessary. In addition, one must remember that this book is not exhaustive. There are many international decisions not included in the book. For instance, there is no reference to the rather important *Swedish Ships* case, decided by an American-Swedish tribunal in 1932.

The book is divided into seven parts: The foundations of interna-

8. Hamilton's earnings averaged $10,000 a year (page 347).

9. An example of Mr. Schachner's research is his examination of Kent's notes of Hamilton's argument in defense of Harry Croswell in a criminal libel case.

tional law, international personality, state jurisdiction, objects of international law, international transactions, war and neutrality, and the law of international institutions. The last part is especially interesting, as it shows the great strides made in the establishment of an international administrative law, mostly through advisory opinions of the Permanent Court of International Justice.

The author's own comments are usually fair, but sometimes he enthusiastically overweighs the importance of a decision, like when he builds a theory of unjust enrichment on the decision in the *Lena Goldfields Company* case, an arbitral award in a dispute between a private company and the Soviet Union. It does not help that the author is willing to classify this decision as "quasi-international law"; even that is an exaggeration.

The defects of the book are minor, however, and it constitutes a valuable contribution to the literature of international law. Its value is enhanced by the fact that we are standing now on the threshold of a new era of codification of international law. Before embarking on that voyage it is good to take an inventory of past achievements. Mr. Schwarzenberger's ledger shows us both the credits—the rules established by international decisions—and the debits —the vast areas in which the rules are still missing.

The volume under review is but a part of a larger enterprise. Volumes 2 and 3 will deal with the practice of the British Foreign Office and with the decisions of the courts of the British Commonwealth and Empire. As the lack of British counterparts of the American works of Moore, Hackworth and Hyde has long been felt by the legal profession, these volumes will be eagerly awaited.

LOUIS B. SOHN

Cambridge, Massachusetts

CHRISTIANITY AND DEMOCRACY. *By Jacques Maritain. New York: Charles Scribner's Sons. $1.25. Pages 198.*

The author, "one of the deepest thinkers of all times," has the perspicuity to see and the courage to say:

> The end of the Roman Empire was a minor event compared with what we behold. We are looking on at the liquidation of what is known as the "modern world."

But he has also the hope and the faith that transcends the crisis. Although he frankly recognizes that "The immediate future is of terrible moment to us," yet he says: "This little book will perhaps seem too optimistic to readers of quick judgment. . . . It did not spring from an optimistic state of mind; it sprang from hope and from a deliberate will to hope." Optimism too often forestalls the effort that is needed to prevent disaster. But hope sees the need and inspires the effort to meet it. The author says:

> We must hope . . . that in spite of the fevers to which the diverse nations will be exposed, either as a result of the long and unutterable torture they have undergone, or as a result of final victory itself, the spirit of national claims and national pride will give way to the spirit of a supranational community; and we must hope . . . that in spite of the physical and moral exhaustion of the peoples, the vital energies hidden in them, and first and foremost in those peoples acclimated to liberty, will rouse the men needed and open up the path to a new civilization . . .

The glory of the author's attitude, and its tonic effect, arise from his frank acceptance of facts. He does not blink conditions because they are unpleasant. He knows that the promise of the businessmen that poverty would be banished by an open season for pelf and profit was broken; that the hope of the isolationists for security in withdrawal proved vain; that the faith of the pacifists that freedom could be maintained by refusing to fight was utterly frustrated. He recognizes that the materialistic philosophy of emancipation "'put out the stars' in the name of science." He states that

> The irreducible antagonisms inherent in an economy based on the self-propagating power of money, the selfishness of the monied classes, and the secession of the proletariat raised by Marxism to the mystic principle of the Revolution, all prevented the democratic tenets from being incorporated into social life; and the impotence of modern societies in the face of poverty and the dehumanization of work, coupled with their inability to transcend the exploitation of man by man, have been a bitter failure for them.

He says:

> Today the poor and oppressed are setting out for the land of justice and fraternity. To have awakened and then betrayed such a hope is a measure of the failure of the modern world.

He then inquires as to the source of democratic hope, and bases his faith on the Power that created that hope. Thus his philosophy, his interpretation of human experience, brings him to the conclusion that democracy is

> . . . the heritage of divine and human values which emanates from our fathers' struggle for freedom, from the Judeo-Christian tradition and from classical antiquity.
>
> This form and this ideal of common life, which we call democracy, springs in its essentials from the inspiration of the Gospel and cannot subsist without it . . .
>
> Christianity announced to the peoples the kingdom of God and the life to come; it has taught them the unity of the human race, the natural equality of all men, children of the same God and redeemed by the same Christ, the inalienable dignity of every soul fashioned in the image of God, the dignity of labor and the dignity of the poor, the primacy of inner values and of good will over external values, the inviolability of consciences, the exact vigilance of God's justice and providence over the great and the small. It has taught them the obligation imposed on those who govern and on those who have possessions to govern in justice, as ministers of God, and to manage the goods entrusted to them to the common advantage, as God's stewards, the submission of all to the law of work and the call to all to share in the freedom of the sons of God. It has taught them the sanctity of truth and the power of the Spirit, the communion of the saints, the divine supremacy of redeeming love and mercy, and the law of brotherly love which reaches out to all, even to those who are our enemies, because all men, to

whatever social group, race, nation or class they may belong, are members of God's family and adopted brothers of the Son of God. Christianity proclaimed that where love and charity are, there God is; and that it is up to us to make every man our neighbor, by loving him as ourselves and by having compassion for him, that is, in a sense, by dying unto ourselves for his sake.[1]

Maritain speaks as a philosopher, we must remember. He is not preaching religion or the dogma of any sect. He recognizes that the "inspiration of the Gospel" worked even though "often misunderstood or disfigured."

> The question does not deal here with Christianity as a religious creed and road to eternal life, but rather with Christianity as leaven in the social and political life of nations and as bearer of the temporal hope of mankind; it does not deal with Christianity as a treasure of divine truth sustained and propagated by the Church, but with Christianity as historical energy at work in the world. It is not in the heights of theology, it is in the depths of the secular conscience and secular existence that Christianity works in this fashion, while sometimes even assuming heretical forms or forms of revolt where it seems to be denying itself.
>
> . . . . It was not given to believers faithful to Catholic dogma but to rationalists to proclaim in France the rights of man and of the citizen, to Puritans to strike the last blow at slavery in America, to atheistic Communists to abolish in Russia the absolutism of private profit. This last process would have been less vitiated by the force of error and would have occasioned fewer catastrophes, had it been performed by Christians. Yet the effort to deliver labor and man from the domination of money is an outgrowth of the currents released in the world by the preaching of the Gospel, such as the effort to abolish servitude and the effort to bring about the recognition of the rights of the human person.

By democracy Maritain does not mean a form of government. It embraces various forms. "It designates first and foremost a general philosophy of human and political life, and a state of mind." He differentiates Nazism and Communism from democracy by pointing out that Nazism denied the oneness of humanity and Communism rejects its "divine transcendence." ". . . if I see in Nazism," he said, "the final stage of an implacable reaction against the democratic principle and against the Christian principle all in one, I see in Communism the final stage in the inner destruction of the democratic principle due to the rejection of the Christian principle."

Maritain does not countenance the pandering sentimentality of self-seeking politicians. He says:

> According to the popular saying, the democratic régime is described as the régime of the sovereignty of the people. This expression is ambiguous, for in truth there is no sovereign nor absolute master in a democracy. . . .
>
> • • •
>
> The people are not God, the people do not have infallible reason and virtues without flaw, the will of the people or the spirit of the people is not the rule which decides what is just or unjust.
>
> • • •
>
> It would be better to say that democracy is the régime wherein the people enjoy their social and political majority and exercise it to conduct their own affairs.

It demands that

> . . . a juridically formulated constitution determine the basic laws . . . absolute primacy of the relations of justice and law at the base of society. . . .
>
> A community of free men cannot live if its spiritual base is not solely law.

This book was written during the war but with the post-war period in view. It was written primarily for the French people; but its perspective is so extended, its principles and conclusions so universally true, that it has universal application. It is a small book, but it has great significance for all the world. It can be read in a short time; but it should not be just read; it should be studied. A fourth or fifth reading will give fresh light and understanding.

The book concludes with a call for "heroic humanism." It is significant that the three last books that I have reviewed for the JOURNAL (See 32 A.B.A.J. 335 and 32 A.B.A.J. 470-471) all emphasized the same essential need. Becker, the historian, Mumford, the social scientist, and Maritain, the philosopher, all have said that our crisis demands a public awakening, a spiritual revival, and a re-consecration to civic service. Says Maritain:

> . . . the peace will not be won unless the people understand and unless the intellectual and moral reform effected within them is equal to the suffering of their present martyrdom, and equal to the breadth of social transformations alike necessary if civilization is to survive. . . . . . all the peoples . . . will have to choose between a common task of heroic renewal and the old selfishness and the old covetousness which would start up chaos all over again. . . .
>
> The essential problem of reconstruction is not a problem of plans, it is a problem of men, the problem of the new leadership to come. It is not by self-appointment that these leaders will become qualified. May they be appointed by heroism and devotion! . . .
>
> . . . we must exact from our leaders moral consistency, the strength of one who acts on principles . . .
>
> . . . to have faith in liberty and in fraternity, an heroical inspiration and an heroical belief are needed which fortify and vivify reason, and which none other than Jesus of Nazareth brought forth in the world.

ROBERT N. WILKIN

Cleveland, Ohio

AMERICAN FOREIGN POLICY IN THE MAKING: 1932-1940: *A Study in Responsibilities. By Charles A. Beard. August 19, 1946. New Haven: Yale University Press. $4. Pages 336.*

This important historical work is not one which should be reviewed critically and comprehensively in this department, as the competence of its analysis and documentation

1. The author quotes statesmen and philosophers in support of his statements. He might also have quoted historians and legal scholars. Francisco Suarez, author of one of the most comprehensive studies of law (*Laws*), pointed out that never before the coming of Christ had the universality of men been gathered together in one political body but was divided into various communities.

might seem to call for. The public utterances and events with which it deals are still fresh and poignant in the minds of our members. American lawyers divide sharply and feel deeply on the issues. Naturally, many members of the Association are quoted—more than a few of them contributors to the columns of the JOURNAL. The House of Delegates has had no occasion to debate and vote an Association attitude on the underlying question. Having given some "preview" of this volume before its publication (32 A.B.A.J. 508) this department may best set forth some description of what it is and contains, to enable our readers to decide for themselves whether they wish to obtain and read so controversial a work.

Professor Beard has undertaken to put together the record on the question: "Who or what led the United States into World War II?" The nature and limitations of his work are described in his Chapter III: "Problems Posed by Charges of War Guilt" (pages 43-46). He deals with public statements as to the foreign policy of the United States (1932-40), "not with pronouncements on international morality, or with secret negotiations, offers or promises in foreign affairs" (Preface). He does not undertake to answer his own questions: his method is to let the documented facts spell out their own accusations, if any. The protagonists of his narrative are President Franklin D. Roosevelt and Wendell Wilkie; but a host of other spokesmen of government and public opinion are quoted, in chronological perspective against the background of fateful events.

The opening chapter gives the record as to whether or not "evil Senators" were "responsible for World War II", in rejecting ratification of the League of Nations without reservations which President Wilson refused to accept. The second chapter brings back to mind the dis-unity and "isolationism" of American public opinion—were the people themselves responsible for the *descensus averni?* In Chapter IV, which is also preliminary, the attitudes of the Democratic leadership in 1924 and 1928, particularly in the party platforms and campaigns, are sketched.

The ensuing six chapters contain the meat of the documentation and analysis:

V. Franklin D. Roosevelt Repudiates the League of Nations in 1932.

VI. President Roosevelt Adheres to an Isolationist Policy in 1933.

VII. Hewing to the Isolationist Line in 1934, 1935 and 1936.

VIII. Turn and Return in 1937-1938.

IX. Neutrality, Peace and Non-Intervention Reaffirmed in 1939.

X. Peace Promises in the Election Year 1940.

Hundreds of historians, publicists, and skilled reviewers, are doubtlessly thumbing this book at this time, with pens and pencils poised to "take it apart" or laud it to the skies. It will start controversies which will rage for many a year. Differing conclusions will be drawn from the record facts; and other data, not in the nature of public utterances by American leaders, will be adduced to point to or support additional or different opinions. Presumably, none of these incidents will disturb a contemplative, objective historian such as Professor Beard, who has assembled the record and left the verdict to the considered judgments of posterity.

New and urgent issues are ahead, as to the determination and conduct of American foreign policy—the extent to which it can and should be divorced from partisan politics and put in experienced hands, the modifications in constitutional provisions or practice which may be imperative, the consequences of American participation in the United Nations. For the consideration of these, Professor Beard's work has a clinical value.

FROM TRAIL DUST TO STAR DUST. *The Story of American Transportation. By Edward A. Starr. 1946. Dallas, Texas: The Transportation Press. $3. Pages 260.*

A vivid and dramatic story of the step-by-step development and expansion of transportation in America, from its venturesome beginnings to the post-war present, has been written by a practical transportation man and earnest student of history who has caught and put on paper much of the romance and daring enterprise as well as the engineering and commercial realities through which the pioneering dreams of bold spirits became commonplaces of American life.

Here is the pictured story, first, of men and women who drove westward through the wilderness and out of the passes, pushed up and down the rivers and the plains, marked out a Santa Fe trail with blood and graves, took possession of an empire and went to work on transportation facilities to hold and serve it. We read again of dusty trails and swaying covered-wagons, of tall ships and long routes, of barges and side-wheel steamers on the rivers, then their trestling as the railroads were pushed westward across the continent. Within present memories came hard-surfaced highways, the automobile and the amazing development of the motor carrier, and finally the lighted airfields, the conquest of air lanes and the flights of the giant planes.

In such a narration, there moves and lives the spirit which has made America a land of individual opportunity and independent ways of life—the tireless quest for practicable invention, the will to start and own businesses and make them grow, the energy and the satisfactions of free enterprise and venture capital. Anything which may help to save the memory and the spirit of those manifestations of America is worth writing. Mr. Starr has given a very readable book; it is made graphic with many maps and illustrations; and the exposition of legal problems has a trained lawyer's grasp.

"Previews" of Books

The literary cupboard of forthcoming books has not been completely bare during August, but the number does not include many of especial interest to lawyers as such, aside from Alpheus T. Mason's awaited biography *Brandeis* (September 9; The Viking Press, New York; $5). Walter P. Armstrong will review it in our October issue.

Around September first there will be available an American edition of *Animal Farm*, by George Orwell (Harcourt, Brace and Company, New York; $1.75). When it was published in a scant edition in England, it caused a stir. The few copies which came to America started people talking—perhaps thinking. This department recommends it for buying and reading for relaxation and half-humorous provocation. The characters, of course, are not short-sighted capitalists, impromptu leaders of labor, fuzzy-minded "fellow-travellers," or rapacious revolutionaries—they are just animals on a farm. Mr. Orwell does not argue a point or intrude a moral, but it is all very expertly done. Somehow the satire seems to show up the fallacies of Communism and to make the collectivist state seem shoddy and unappealing. This might turn out to be one of the talked-about books of 1946.

Ten poems in the heroic mold, from the works of Homer, Virgil, Lucretius, Chaucer, Dante, Spenser, Milton, Byron and Wordsworth, will be discussed in *The Noble Voice* by Mark Van Doren, one of America's most enjoyable critics, who never forgets that a great deal of our reading is done for pleasure (September 16; Holt and Company, New York; $3).

What is described as an "uncensored" story of Marshall Tito and the late General Draga Mihailovich has been written by David Martin, former Canadian newspaper man and RCAF pilot, under the title of *Ally Betrayed*. Prentice-Hall of New York will publish it in September ($3.50). It is said to be likely to renew a lot of controversy as to the policy of the British Foreign Office and the American State Department as to the picturesque Chetnik who organized a resistance to the Nazis, as they invaded Yugoslavia, which many believe was the decisively delaying factor that saved Stalingrad for the Soviet Union whose followers later sent him to a traitor's death.

Trygve Lie, the lawyer who is Secretary-General of the United Nations, has written the introduction to Louis Dolivet's new handbook, *United Nations*. The organizational chart, lists of personnel, etc., supplement the Charter and the Statute of the Court. (September 3; Farrar, Straus and Company, New York; $1.75).

The story of *Anna Zenger*, the first woman newspaper editor and publisher in America, who is said to be the unheralded heroine of Peter Zenger's dramatic fight for freedom of the press in America and the struggles which raged around the historic Eastchester Church in Mt. Vernon, New York, more than two centuries ago, has been written by Kent Cooper, the vigorous Executive Director of the Associated Press. (October 20; Farrar, Straus and Company; $3.75).

In November the Viking Press will publish Frances Perkin's reminiscent *The Roosevelt I Knew* ($3.75).

Donald M. Nelson's *Arsenal of Democracy*, his description of the work of the War Production Board, will be issued on September 5, having been postponed since May 2. (Harcourt, Brace and Company, New York; $3.50).

TRYGVE LIE'S SUMMARY

(Continued from page 557)

atomic power, the choice is between life and death. The failure of The United Nations would mean the failure of peace, the triumph of destruction.

As the Preparatory Commission foresaw, the Secretary General in certain circumstances must speak for the Organization as a whole. It is with a deep sense of responsibility that I appeal to the members of The United Nations, and more especially to those powers which have special rights and obligations under the Charter, to ponder the dangers to which I have called attention and to exert every effort to overcome them. There is much that the secretariat can do, and, given the approval and co-operation of the members and the voting of the necessary credits, it will not fail. But upon the members of the Organization lies the ultimate responsibility; upon them it ultimately depends whether The United Nations fulfills the hope that is placed in it.

26 June 1946.

TRYGVE LIE,
Secretary General.

Know Your House of Delegates

Members of the American Bar Association in each State should familiarize themselves with the names and qualifications of the members of the House of Delegates, and in particular with their own representatives in that agency of the profession of law.

The House of Delegates has become increasingly an influence in behalf of the interests of American lawyers and as a spokesman in behalf of the long-run interests of the public. The thoroughly representative character of the House, due to the diverse sources and methods through which its membership is chosen, gives great weight to its considered opinions as reflecting the views of a cross-section of America. A more representative body in its makeup, so far as lawyers from all parts of the country and all angles of the profession are concerned, could hardly be devised.

Members of the Association will do well to understand the representative composition of their House of Delegates, and see to it that they are represented in it as they wish to be. The basic purpose of the House is to bring together in one body for debate and action, the democratically chosen representatives of virtually all angles of the profession of law in the United States. Components of the House are (Constitution, Article V, Sections 1 and 3):

State Delegates: One from each State, nominated by petition and elected for a three-year term by the mail ballots of all the Association members in that State (Article V, Sections 4 and 5); with a Delegate likewise chosen from the District of Columbia, Hawaii, Puerto Rico, and a Territorial Group.

State Bar Delegate: At least one from each State Bar Association or organization (Article V, Section 6)—a limited number more based on their number of members in the American Bar Association: such delegates being elected by the State Bar organization in such manner as its Constitution or other rules provide.

Local Bar Association Delegates: One from each of sixteen larger local Bar Associations, likewise chosen by the local Association (Article V, Section 6); such delegates being in diminution of the number which the State Association in that State would otherwise have.

Representatives of various affiliated organizations of the legal profession, which are named in the Association's Constitution (Article V, Sections 3 and 7).

Delegates from various organizations of the legal profession which the House has admitted to affiliation. (Article V, Section 7).

The Attorney General of the United States, ex officio

The Solicitor General of the United States, ex officio

The Director of the Administrative Office of the United States Court, ex officio

The Officers of the Association, ex officio

The Members of the Board of Governors, ex officio

The Chairman of Sections of the Association (Article V, Section 3; Article IX, Section 1).

Former Presidents of the Association who registered by 12 o'clock on the opening day of the last Annual Meeting (Article V, Section 3; lines 32-37).

It will be perceived that the above-stated basis gives to the smaller States a larger proportionate representation as compared with the more populous States, if the Delegates were allocated solely on the basis of the American Bar Association membership in each State. On the other hand, the larger States often gain representation through the accreditation of lawyers serving in other capacities than as State Delegates or State or local Bar Association Delegates.

Total Membership of the House

As constituted for the mid-year meeting held in Chicago on July 1-3, the House had 188 members, made up as follows:

State Delegates	52
State Bar Delegates	72
Local Bar Association Delegates	15
Assembly Delegates	8
Representatives of Named Affiliated Organizations	5
Delegates of Organizations Admitted to Affiliation	6
The Attorney General and Solicitor General	2
The Director of the Administrative Office of the United States Court	1
The Officers of the Association	4
The Members of the Board of Governors	12
The Chairmen of Sections	14
The Former Presidents Who Registered	7

List of Members of the House of Delegates

By States, the names of the present members of the House of Delegates, with their representative capacities, are as follows:

Name of Delegate	Representative Capacity	Term Expires
ALABAMA		
Wm. Logan Martin 600 N. 18th St., Birmingham 3	Board of Governors (1946) and State Delegate (1947)	1947
Richard T. Rives Box 235, Montgomery	Alabama State Bar Association	1946
Henry Upson Sims Protective Life Bldg., Birmingham 3	Former President—American Bar Association	
ARIZONA		
T. J. Byrne Bank of Arizona Bldg., Prescott	The State Bar of Arizona	1946
J. Byron McCormick College of Law, University of Arizona, Tucson	State Delegate	1948
ARKANSAS		
William H. Arnold Box 676, Texarkana	Bar Association of Arkansas	1946
A. W. Dobyns 314 W. Markham St., Little Rock	Board of Governors (1947) and State Delegate (1946)	1947
CALIFORNIA		
Martin J. Dinkelspiel 333 Montgomery St., San Francisco 4	Bar Association of San Francisco	1946
Paul Fussell 433 S. Spring St., Los Angeles 13	Los Angeles Bar Association	1946
Russell F. O'Hara 525 Capitol St., Vallejo	The State Bar of California	1946
Delger Trowbridge One Montgomery St., San Francisco 4	State Delegate	1947
Loyd Wright 111 W. Seventh Bldg., Los Angeles 14	The State Bar of California	1946
COLORADO		
Wilbur F. Denious Equitable Bldg., Denver 2	The Colorado Bar Association (1946) and Chairman—The National Conference of Bar Examiners (1946)	1946
James A. Woods First Nat'l Bank Bldg., Denver 2	State Delegate	1946
CONNECTICUT		
Charles M. Lyman 129 Church St., New Haven 8	State Delegate	1948
Hereward Wake Box 777, Westport	State Bar Association of Connecticut	1946
DELAWARE		
Percy Warren Green Equitable Bldg., Wilmington 7	State Delegate	1946
James R. Morford Delaware Trust Bldg., Wilmington 28	Board of Governors	1946
William Poole Delaware Trust Bldg., Wilmington 28	Delaware State Bar Association	1946
DISTRICT OF COLUMBIA		
Walter M. Bastian National Press Bldg., Washington 4	Treasurer—American Bar Association	1946
John J. Carmody 815 15th St., N.W., Washington 5	Bar Association of the District of Columbia	1946
Henry P. Chandler U. S. Supreme Court Bldg., Washington 13	The Director of the Administrative Office of the United States Courts	
Tom C. Clark Dept. of Justice, Washington 25	The Attorney General of the United States	
Robert E. Freer Federal Trade Commission, Washington 25	The Federal Bar Association	1946
Wilbur L. Gray Evans Bldg., Washington 5	Bar Association of the District of Columbia	1946
Francis W. Hill, Jr. Woodward Bldg., Washington 5	Bar Association of the District of Columbia	1946
Bolitha J. Laws U. S. Dist. Court for Dist. of Columbia, Washington 1	Chairman—Section of Judicial Administration	1946
J. Howard McGrath Dept. of Justice, Washington 25	The Solicitor General of the United States	
George M. Morris American Security Bldg., Washington 5	Former President—American Bar Association	
Percy W. Phillips Southern Bldg., Washington 5	Chairman—Section of Taxation	1946
Henry I. Quinn Woodward Bldg., Washington 5	State Delegate	1948
Marguerite Rawalt 1801 16th St., N.W., Washington 9	National Association of Women Lawyers	1946
Charles S. Rhyne 730 Jackson Place, N.W., Washington 6	Assembly Delegate	1947
James J. Robinson U. S. Supreme Court Bldg., Washington 13	Chairman—Section of Criminal Law	1946
Edgar Turlington 1416 F St., N.W., Washington 4	Chairman—Section of International and Comparative Law	1946
Robert C. Watson 815 Fifteenth St., N.W., Washington 5	Chairman—Section of Patent, Trade-Mark and Copyright Law	1946
FLORIDA		
Cody Fowler Citizens Bldg., Tampa 2	State Delegate	1947
Robert R. Milam Greenleaf Bldg., Jacksonville 1	Florida State Bar Association	1946
GEORGIA		
Arthur G. Powell Citizens & Southern Nat'l Bank Bldg., Atlanta 3	State Delegate	1946
John M. Slaton The 22 Marietta Bldg., Atlanta 3	Assembly Delegate	1947

Name of Delegate	Representative Capacity	Term Expires
John L. Tye, Jr. Candler Bldg., Atlanta 3	Georgia Bar Association	1946
HAWAII		
J. Garner Anthony Box 3199, Honolulu	State Delegate	1947
Livingston Jenks Box 3196, Honolulu	Bar Association of Hawaii	*1912
IDAHO		
A. L. Merrill Carlson Bldg., Pocatello	State Delegate	1946
Paul T. Peterson Box 29, Idaho Falls	Idaho State Bar	1946
ILLINOIS		
Warren B. Buckley 135 S. LaSalle St., Chicago 3	Illinois State Bar Association	1946
J. F. Dammann 120 W. Adams St., Chicago 3	The Chicago Bar Association	1946
Tappan Gregory 105 S. LaSalle St., Chicago 3	Board of Governors (1946) and State Delegate (1948)	1948
Charles B. Stephens First Nat'l Bank Bldg., Springfield	Chairman—Section of Bar Activities	1946
Floyd E. Thompson 11 S. LaSalle St., Chicago 3	Illinois State Bar Association (1946) and American Law Institute (1946)	1946
Edgar B. Tolman 30 N. La Salle St., Chicago 2	Board of Governors	
Henry C. Warner Dixon	Illinois State Bar Association	1946
INDIANA		
Chase Harding Citizens Nat'l Bank Bldg., Crawfordsville	The Indiana State Bar Association	1946
Charles A. Lowe Lawrenceburg	The Indiana State Bar Association	1946
Eli F. Seebirt Associates Bldg., South Bend 2	Board of Governors	1947
Julian Sharpnack 433 Washington St., Columbus	State Delegate	1946
IOWA		
Frederic M. Miller State House, Des Moines 19	State Delegate	1948
John C. Pryor Tama Bldg., Burlington	President — National Conference of Commissioners on Uniform State Laws	1946
Burt J. Thompson State Bank Bldg., Forest City	Iowa State Bar Association	1946
KANSAS		
Douglas Hudson Marble Bldg., Fort Scott	State Delegate	1947
Beryl R. Johnson Nat'l Bank of Topeka Bldg., Topeka	The Bar Association of the State of Kansas	1946
W. E. Stanley First Nat'l Bank Bldg., Wichita 2	Assembly Delegate	1947
KENTUCKY		
T. M. Galphin, Jr. Marion E. Taylor Bldg., Louisville 2	State Delegate	1947
Frank S. Ginocchio 268 W. Short St., Lexington	Kentucky State Bar Association	1946
LOUISIANA		
LeDoux R. Provosty Guaranty Bank & Trust Co. Bldg., Alexandria 1	State Delegate (1946)	Interim Delegate
Leon Sarpy Whitney Bldg., New Orleans 12	Louisiana State Bar Association	1946
MAINE		
(Vacancy)	Maine State Bar Association	1946
Clement F. Robinson 85 Exchange St., Portland 3	State Delegate	1948
MARYLAND		
Paul M. Higinbothom Munsey Bldg., Baltimore 2	The Bar Association of Baltimore City, Inc.	1946
Charles Ruzicka First Nat'l Bank Bldg., Baltimore 2	Maryland State Bar Association	1946
W. Conwell Smith Court House, Baltimore 2	State Delegate	1946
MASSACHUSETTS		
Nathan P. Avery 56 Suffolk St., Holyoke	Massachusetts Bar Association	1946
Elias Field 15 State St., Boston 9	The Bar Association of the City of Boston	1946
Frank W. Grinnell 60 State St., Boston 9	State Delegate	1947
Joseph Schneider 11 Beacon St., Boston 8	The Law Society of Massachusetts	1946
Mayo Adams Shattuck 15 State St., Boston 9	Massachusetts Bar Association	1946
MICHIGAN		
George E. Brand Barlum Tower, Detroit 26	State Bar of Michigan	1946
Glenn M. Coulter Ford Bldg., Detroit 26	State Bar of Michigan	1946
Dean W. Kelley Mutual Bldg., Lansing 7	State Bar of Michigan	1946
James I. McClintock Fidelity Bldg., Detroit 26	Detroit Bar Association	1946
W. Leslie Miller National Bank Bldg., Detroit 26	State Delegate	1948
Glenn R. Winters Hutchins Hall, Ann Arbor	American Judicature Society	1946
MINNESOTA		
Donald D. Harries Alworth Bldg., Duluth 2	Minnesota State Bar Association	1946
Morris B. Mitchell First Nat'l-Soo Line Bldg., Minneapolis 2	State Delegate (1946)	Interim Delegate
James C. Otis First Nat'l Bank Bldg., St. Paul 1	Minnesota State Bar Association	1946

*Serving until successor is certified.

Name of Delegate	Representative Capacity	Term Expires
MISSISSIPPI		
Hubert S. Lipscomb Millsaps Bldg., Jackson 109	State Delegate	1948
W. E. Morse Standard Life Bldg., Jackson 110	Mississippi State Bar	1946
Greek L. Rice New Capitol, Jackson	National Association of Attorneys General	1946
MISSOURI		
John T. Barker Commerce Bldg., Kansas City 6	State Delegate	1947
James E. Garstang 418 Olive St., St. Louis 2	The Bar Association of St. Louis	1946
William E. Kemp City Hall, Kansas City 6	Missouri Bar	1946
Joseph A. McClain, Jr. Railway Exchange Bldg., St. Louis 1	Chairman—Section of Legal Education and Admissions to the Bar	1946
Roland F. O'Bryen Boatmen's Bank Bldg., St. Louis 2	Missouri Bar	1946
Allen L. Oliver H-H Bldg., Cape Girardeau	Missouri Bar	1946
Kenneth Teasdale Boatmen's Bank Bldg., St. Louis 2	Assembly Delegate	1946
MONTANA		
James T. Finlen, Jr. Hennessy Bldg., Butte	Montana Bar Association	1946
W. J. Jameson Electric Bldg., Billings	Board of Governors	1946
Julius J. Wuerthner Ford Bldg., Great Falls	State Delegate	1948
NEBRASKA		
Paul E. Boslaugh Clarke Bldg., Hastings	Nebraska State Bar Association	1946
V. J. Skutt 3316 Farnam St., Omaha	Chairman—Section of Insurance Law	1946
George H. Turner State House, Lincoln 9	State Delegate	1948
NEVADA		
John Shaw Field 15 W. Second St., Reno	State Delegate	1946
George L. Sanford Carson City	State Bar of Nevada	1946
NEW HAMPSHIRE		
Robert W. Upton Patriot Bldg., Concord	New Hampshire Bar Association	1946
Louis E. Wyman 45 Market St., Manchester	State Delegate	1946
NEW JERSEY		
Robert K. Bell 801 Asbury Ave., Ocean City	New Jersey State Bar Association	1946
Robert Carey 26 Journal Square, Jersey City 6	New Jersey State Bar Association	1946
Allen B. Endicott, Jr. Guarantee Trust Bldg., Atlantic City	New Jersey State Bar Association	1946
William W. Evans 129 Market St., Paterson 1	State Delegate	1948
George W. C. McCarter 13 Commerce St., Newark 2	New Jersey State Bar Association	1946
Sylvester C. Smith, Jr. 18 Bank St., Newark 1	Assembly Delegate	1946
Arthur T. Vanderbilt 744 Broad St., Newark 2	Former President — American Bar Association	
NEW MEXICO		
Floyd W. Beutler Taos	State Bar of New Mexico	1946
Ross L. Malone, Jr. Rosswell	State Delegate	1947
NEW YORK		
George H. Bond State Tower Bldg., Syracuse 2	State Delegate	1946
John Kirkland Clark 72 Wall St., New York 5	Assembly Delegate	1946
William A. Dougherty 30 Rockefeller Plaza, New York 20	Chairman—Section of Mineral Law	1946
Walter W. Land 70 Pine St., New York 5	Chairman—Section of Real Property, Probate and Trust Law	1946
Robert McC. Marsh 15 William St., New York 5	New York County Lawyers' Association	1946
Franklin E. Parker, Jr. 40 Wall St., New York 5	The Association of the Bar of the City of New York	1946
William L. Ransom 33 Pine St., New York 5	Former President — American Bar Association and Board of Governors	
Joseph Rosch D. & H. Bldg., Albany 1	New York State Bar Association	1946
Lyman M. Tondel, Jr. 31 Nassau St., New York 5	Chairman — Junior Bar Conference	1946
Philip J. Wickser Buffalo Insurance Bldg., Buffalo 3	New York State Bar Association	1946
NORTH CAROLINA		
Louis J. Poisson Tide Water Bldg., Wilmington	The North Carolina State Bar	1946
Willis Smith Security Bank Bldg., Raleigh	President — American Bar Association and Assembly Delegate	1946
Francis E. Winslow Peoples Bank & Trust Co. Bldg., Rocky Mount	State Delegate	1947
NORTH DAKOTA		
Herbert G. Nilles Black Bldg., Fargo	State Delegate	1947
Roy A. Ployhar Valley City	State Bar Association of North Dakota	1946
OHIO		
Howard L. Barkdull Union Commerce Bldg., Cleveland 14	State Delegate	1946

Name of Delegate	Representative Capacity	Term Expires
Merton L. Ferson Univ. of Cincinnati Law School, Cincinnati 21	President — Association of American Law Schools	1946
H. Austin Hauxhurst Bulkley Bldg., Cleveland 15	The Cleveland Bar Association	1946
Waymon B. McLeskey 33 N. High St., Columbus 15	The Ohio State Bar Association	1946
Murray Seasongood Union Central Bldg., Cincinnati 2	Assembly Delegate	1947
Murray M. Shoemaker First Nat'l Bank Bldg., Cincinnati 2	The Cincinnati Bar Association	1946
Joseph D. Stecher Toledo Trust Bldg., Toledo 4	Secretary — American Bar Association	1946
Jay P. Taggart Union Commerce Bldg., Cleveland 14	The Ohio State Bar Association	1946
OKLAHOMA		
James D. Fellers Apco Tower, Oklahoma City 2	Oklahoma Bar Association	1946
Gerald B. Klein 1212 E. 29th St., Tulsa	Oklahoma Bar Association	1946
A. W. Trice American Bldg., Ada	State Delegate	1948
OREGON		
Arthur H. Lewis Public Service Bldg., Portland 4	Oregon State Bar	1946
F. M. Sercombe Yeon Bldg., Portland 4	State Delegate	1946
Sidney Teiser Morgan Bldg., Portland 5	Chairman—Section of Corporation, Banking and Mercantile Law	1946
PENNSYLVANIA		
John G. Buchanan Union Trust Bldg., Pittsburgh 19	Pennsylvania Bar Association	1946
Joseph W. Henderson Packard Bldg., Philadelphia 2	Former President — American Bar Association	
David F. Maxwell Packard Bldg., Philadelphia 2	State Delegate (1947)	Interim Delegate
Robert T. McCracken 1421 Chestnut St., Philadelphia 2	Philadelphia Bar Association	1946
M. Louise Rutherford Real Estate Tr. Bldg., Philadelphia 7	Pennsylvania Bar Association	1946
G. Dixon Shrum Law & Finance Bldg., Pittsburgh	The Allegheny County Bar Association	1946
PUERTO RICO		
Martin Travieso The Capitol, San Juan	State Delegate	1948
RHODE ISLAND		
Henry C. Hart Hospital Trust Bldg., Providence 3	Board of Governors (1948) and State Delegate (1946)	1948
Frank L. Hinckley Industrial Trust Bldg., Providence 3	Rhode Island Bar Association	1946
SOUTH CAROLINA		
Pinckney L. Cain Palmetto Bldg., Columbia (F)	South Carolina Bar Association	1946
Douglas McKay Carolina Life Bldg., Columbia (D)	State Delegate	1948
SOUTH DAKOTA		
Dwight Campbell Milwaukee Station Bldg., Aberdeen	The State Bar of South Dakota	1946
Roy E. Willy Security Nat'l Bank Bldg., Sioux Falls	State Delegate	1948
TENNESSEE		
Walter P. Armstrong Commerce Title Bldg., Memphis 3	Former President — American Bar Association	
Charles S. Coffey Volunteer Bldg., Chattanooga 2	Bar Association of Tennessee	1946
Fyke Farmer American Nat'l Bank Bldg., Nashville 3	State Delegate (1947)	Interim Delegate
Mitchell Long Hamilton Nat'l Bank Bldg., Knoxville 02	Board of Governors	1948
TEXAS		
James P. Alexander Supreme Court, Capitol Station, Austin 11	State Bar of Texas (1946) and Chairman — National Conference of Judicial Councils (1946)	1946
Leo Brewer Alamo Nat'l Bank Bldg., San Antonio 5	State Bar of Texas	1946
John P. Bullington Esperson Bldg., Houston 2	Chairman—Section of Public Utility Law	1946
Frank Hartgraves Menard	State Bar of Texas	1946
Jas. L. Shepherd, Jr. Esperson Bldg., Houston 2	State Delegate	1948
David A. Simmons Commerce Bldg., Houston 2	Board of Governors	1946
J. Cleo Thompson Kirby Bldg., Dallas 1	The Bar Association of Dallas	1946
UTAH		
Sam Cline Milford	State Delegate (1946)	Interim Delegate
Leland M. Cummings State Capitol, Salt Lake City 1	Utah State Bar	1946
VERMONT		
Deane C. Davis 25 Tremont St., Barre	Board of Governors and State Delegate	(1948) (1947)
Osmer C. Fitts Brattleboro	Vermont Bar Association	1946

Name of Delegate	Representative Capacity	Term Expires
VIRGINIA		
Stuart B. Campbell, Wytheville	The Virginia State Bar Association	1946
Andrew D. Christian, Mutual Life Bldg., Richmond 19	Association of Life Insurance Counsel	1946
Thomas B. Gay, Electric Bldg., Richmond 12	State Delegate	1947
Guy B. Hazelgrove, 1001 E. Main St., Richmond 19	Virginia State Bar	1946
WASHINGTON		
Frank E. Holman, Hoge Bldg., Seattle 4	Seattle Bar Association	1946
William G. McLaren, Dexter Horton Bldg., Seattle 4	State Delegate	1948
Robin V. Welts, Skagit Nat'l Bank Bldg., Mount Vernon	Washington State Bar Association	1946
WEST VIRGINIA		
Rolla D. Campbell, Box 2187, Huntington	State Delegate (1946)	Interim Delegate
Frank C. Haymond, Supreme Court of Appeals, State Capitol, Charleston 5	Board of Governors	1947
Thomas B. Jackson, Kanawha Valley Bldg., Charleston 22	The West Virginia Bar Association	1946
Clarence E. Martin, Peoples Trust Bldg., Martinsburg	Former President — American Bar Association	
WISCONSIN		
Carl B. Rix, Wells Bldg., Milwaukee	State Bar Association of Wisconsin	1946
Albert B. Houghton, 152 W. Wisconsin Ave., Milwaukee 3	State Delegate	1947
W. J. Mattison, City Hall, Milwaukee 2	Chairman—Section of Municipal Law	1946
Edmund B. Shea, 735 N. Water St., Milwaukee 2	State Bar Association of Wisconsin	1946
WYOMING		
L. A. Bowman, First Nat'l Bank Bldg., Lovell	Wyoming State Bar	1946
William O. Wilson, Majestic Bldg., Cheyenne	Board of Governors (1948) and State Delegate (1948)	1948
TERRITORIAL GROUP (Alaska, Canal Zone, and Philippine Is.)		
R. E. Robertson, Seward Bldg., Juneau, Alaska	State Delegate	1947

ASSEMBLY DELEGATES

	Term Expires
John Kirkland Clark, 72 Wall St., New York 5, N. Y.	1946
Sylvester C. Smith, Jr., 18 Bank St., Newark 1, N. J.	1946
Willis Smith, Security Bank Bldg., Raleigh, N. C.	1946
Kenneth Teasdale, Boatmen's Bank Bldg., St. Louis 2, Mo.	1946
Charles S. Rhyne, 730 Jackson Place, N.W., Washington 6, D. C.	1947
Murray Seasongood, Union Central Bldg., Cincinnati 2, Ohio	1947
John M. Slaton, The 22 Marietta Bldg., Atlanta 3, Ga.	1947
W. E. Stanley, First National Bank Bldg., Wichita 2, Kans.	1947

Calendar of United Nations Events

September 2	Food and Agriculture Conference—2nd Session	Copenhagen
September 2 (Tentative)	Committee for Negotiations with Specialized Agencies	New York
September 3 (Tentative)	Committee on Arrangements for Consultation with Non-Governmental Organizations	New York
September 4	Council Meeting of PICAO	Montreal
September 6 (Tentative)	Economic and Social Council—3rd Session	New York
September 8	Governing Body of the ILO	Montreal
September 19	International Labor Conference—29th Session	Montreal
September 23	General Assembly of the United Nations	New York
September 23	Transfer of UNESCO offices from London to Paris	
October 1-15	Regional Conference of PICAO	Cairo
October 15 (Tentative)	Preparatory Commission of the International Conference on Trade and Employment	London
October 15 (Tentative)	Commission on Narcotic Drugs	New York
November 4	UNESCO General Conference—1st Session	Paris
November (exact date not yet fixed)	Interim Commission of World Health Organization and its subcommittees	Geneva

RESULTS OF ELECTIONS FOR STATE DELEGATES

ON August 3, 1946, the Board of Elections met at the Headquarters of the Association, canvassed the ballots, and announced the results of the balloting for State Delegates.

There were twenty-one jurisdictions voting in the election this year. Seventeen of these elected delegates for the regular three-year term beginning at the conclusion of the next Annual Meeting of the Association. Eight jurisdictions voted for delegates to fill vacancies in terms expiring in 1946 and 1947.

In the twenty-one jurisdictions voting, there were four (Arkansas, Maryland, Nevada and Utah) in which more than one candidate had been nominated by petition. Of the delegates elected, fourteen succeed themselves. The total number of ballots sent out was 15,445. The total number of ballots returned was 6,242.

RESULTS OF ELECTION FOR STATE DELEGATES

Jurisdiction	*Delegate Elected*	*Ballots Mailed*	*Ballots Returned*	*Votes Received*
Arkansas	Edward L. Wright, Little Rock	285	218	163
Colorado	James A. Woods, Denver	403	167	149
Delaware	Percy Warren Green, Wilmington	137	68	60
Georgia	Arthur G. Powell, Atlanta	424	248	221
Idaho	A. L. Merrill, Pocatello	116	76	65
Indiana	Telford B. Orbison, New Albany	731	278	256
Louisiana	LeDoux R. Provosty, Alexandria	562	235	228
	*LeDoux R. Provosty, Alexandria	562	219	209
Maryland	Chas. Ruzicka, Baltimore	751	473	363
Minnesota	William W. Gibson, Minneapolis	636	245	231
	*William W. Gibson, Minneapolis	636	229	215
Nevada	Chas. A. Cantwell, Reno	161	125	63
New Hampshire	Louis E. Wyman, Manchester	134	72	68
New Mexico	**Ross L. Malone, Jr., Roswell	134	64	58
New York	George H. Bond, Syracuse	1,174	1,132	1,066
Ohio	Howard L. Barkdull, Cleveland	1,714	694	631
Oregon	Robert F. Maguire, Portland	387	209	201
Pennsylvania	**David F. Maxwell, Philadelphia	1,772	607	572
Rhode Island	Henry C. Hart, Providence	178	94	91
Tennessee	**John T. Shea, Memphis	439	226	214
Utah	Sam Cline, Milford	173	110	58
	*Sam Cline, Milford	173	105	59
Vermont	**Deane C. Davis, Barre	115	64	64
West Virginia	Rolla D. Campbell, Huntington	324	145	136
	*Rolla D. Campbell, Huntington	324	139	133
	TOTALS	15,445	6,242	5,574

BOARD OF ELECTIONS

EDWARD T. FAIRCHILD, Chairman;
WILLIAM P. MACCRACKEN, JR.;
LAURANT K. VARNUM.

*To fill vacancy expiring with adjournment of 1946 Annual Meeting.

**To fill vacancy expiring with adjournment of 1947 Annual Meeting.

Sixty-Ninth Annual Meeting

ATLANTIC CITY, NEW JERSEY
OCTOBER 28-NOVEMBER 1, 1946

Tentative Schedule of Sessions

Friday, October 25
10:00 A.M. and 2:00 P.M.
Section of Patent, Trade-Mark and Copyright Law

12:30 P.M.
Luncheon of Section of Patent, Trade-Mark and Copyright Law

Saturday, October 26
10:00 A.M.
Committee on Hearings
Section of Patent, Trade-Mark and Copyright Law
Section of Taxation

2:00 P.M.
Committee on Hearings
Section of Patent, Trade-Mark and Copyright Law
Section of Taxation

7:30 P.M.
Dinner of Section of Patent, Trade-Mark and Copyright Law

Sunday, October 27
9:00 A.M.
Junior Bar Conference: Annual meeting of delegates from state and local junior bar groups

10:00 A.M.
Section of Taxation

12:30 P.M.
Junior Bar Conference, luncheon
Section of Bar Activities: Annual luncheon and conference of Association Secretaries
Section of Taxation, luncheon

2:00 P.M.
Junior Bar Conference
Section of Taxation

Monday, October 28
10:00 A.M.
Assembly of the Association

2:00 P.M.
House of Delegates
Section of Corporation, Banking and Mercantile Law
Section of Insurance Law
Section of International and Comparative Law
Section of Judicial Administration
Section of Municipal Law
Section of Public Utility Law
Section of Real Property, Probate and Trust Law
Section of Taxation

8:00 P.M.
Assembly

10:00 P.M.
President's reception

Tuesday, October 29
10:00 A.M.
Section meetings:
- Bar Activities
- Corporation, Banking and Mercantile Law
- Criminal Law
- Insurance Law: Round Tables
- Junior Bar Conference
- Labor Relations Law: organization meeting
- Mineral Law
- Municipal Law
- Public Utility Law
- Real Property, Probate and Trust Law:
  - Probate and Trust Divisions
  - Real Property Division

Conference of Bar Examiners, jointly with Section of Legal Education and Admissions to the Bar

12:30 P.M.
Section of Legal Education, and Conference of Bar Examiners, luncheon
Section of Mineral Law, luncheon

2:00 P.M.
Section meetings:
- Bar Activities
- Corporation, Banking and Mercantile Law
- Criminal Law
- Insurance Law: round tables
- International and Comparative Law
- Judicial Administration, jointly with Traffic Court Committee
- Labor Relations Law
- Legal Education and Admissions to the Bar, jointly with Conference of Bar Examiners
- Mineral Law
- Municipal Law
- Public Utility Law
- Real Property, Probate and Trust Law
- Taxation

7:30 P.M.
Section dinners:
- Corporation, Banking and Mercantile Law
- Insurance Law
- Judicial Administration
- Public Utility
- Real Property, Probate and Trust Law

10:00 P.M.
Junior Bar Conference dance

Wednesday, October 30
10:00 A.M.
Assembly of the Association

12:30 P.M.
Section of International and Comparative Law, jointly with Junior Bar Conference, luncheon

2:00 P.M.
House of Delegates
Section of Administrative Law: organization meeting
Section of Insurance Law
Section of Judicial Administration, jointly with Committee on Improving the Administration of Justice

Thursday, October 31
10:00 A.M.
Assembly of the Association

2:00 P.M.
House of Delegates

7:00 P.M.
Annual Dinner

Friday, November 1
10:00 A.M.
Assembly of the Association and House of Delegates

Lawyers in the News

● When the House of Delegates met in Chicago on July 1-3, it was found that one of its valued members, WILLIAM EWING KEMP, long an active worker in the organized Bar, had taken office as Mayor of Kansas City, Missouri, on April 10 of this year. His political and personal success gave him the acclaim of members of the House and the profession of law, irrespective of partisan or factional considerations.

WILLIAM E. KEMP

Mayor KEMP was born in Missouri on February 8, 1889, two and one-half miles north of LaMonte in Pettis County. When he was two years old, his parents moved into LaMonte, where he spent his boyhood. He was graduated from LaMonte High School and in 1908 from the Warrensburg Normal School, now the Central Missouri State Teachers' College. After being a high school teaching-principal for four years, he attended the University of Missouri, where he received his A.B. degree in 1914. He took two years of law at the University of Missouri and his third year of law at George Washington University, from which he was graduated in June of 1917. World War I intervened, and he entered the Army as a private in September of 1917 and served until February of 1919 as an artillery instructor. He left the service with the rank of First Lieutenant.

Going to Kansas City, he entered the law office of Cooper, Neel and Wright. Later he became a member of the firm of Cooper, Neel, Kemp and Sutherland. In 1938 he was appointed by Governor Lloyd C. Stark to the Kansas City Court of Appeals, to fill an unexpired term. In June of 1940, he resigned from the bench and was appointed as Director of Law for the City of Kansas City. He resigned this post on February 1 of this year, when he was named by petition as a candidate for Mayor of Kansas City on an "anti-Pendergast" ticket. The ensuing campaign resulted in his election. He was inaugurated as Mayor on April 10.

Mayor KEMP is a member of the American Legion, of the 40 and 8 Society, the Military Order of the World Wars, the American Bar Association, the Missouri Bar Association, and the Kansas City Lawyers' Association. In the House of Delegates he represents the Missouri Bar Association. His hobbies are fishing, tramping and horse-back riding.

● A gifted American lawyer who has served well his profession, private industry, his State and country, and the world, in many capacities, has been brought from his retirement to his farm in upstate New York, by Governor Thomas E. Dewey, to serve as chairman of the thirty-member commission which was created by the State Legislature on the Governor's recommendation, to study and report on the acutely controversial issue as to the need for the establishment of a State University in New York.

OWEN D. YOUNG

Few American lawyers have had as diversified a career as that of OWEN D. YOUNG. Born in 1874 in Van Hornesville where he has lately been living in retirement, he was graduated in 1894 from St. Lawrence University, of which he was later a Trustee from 1912 to 1934 and President during the last ten years of that period. He was graduated from the Boston University Law School in 1896, practised law successfully in Boston, and was a member of the firm of Tyler and Young there until 1913. Meanwhile, he had taught the courses in pleadings at Boston University.

YOUNG moved to New York City in 1913 as counsel for the General Electric Company. He was its vice president until 1922 and chairman of its board of directors until 1939. He served the Radio Corporation of America in a like capacity until 1933, and was also the chairman of the advisory committee of the National Broadcasting Company. He was a director of the Federal Reserve Bank of New York for many years and its chairman in 1938-40. His corporate and financial directorships were many.

His advice and services were repeatedly called for by Presidents of the United States. He was a member of the Industrial Conferences called by Presidents Wilson and Harding, and other bodies constituted by Presidents Coolidge and Hoover. He took an outstanding part in the attempted solutions of reparations and other problems following World War I, was one of the authors of the Dawes and Young Plans, and served as Agent General for Reparation Payments in 1924. Meanwhile, he was the recipient of numerous honorary degrees, as well as decorations by many foreign governments, and held high places in various cultural and humanitarian organizations, including the presidency of the Academy of Political Science in the City of New York.

YOUNG became a member of the American Bar Association in 1911, and is also a member of the Massachusetts and New York State Bar Associations and the Boston City Bar Association. Long an active farmer, he is especially devoted to his membership in the Grange and his directorship in The Holstein Friesian Association of America.

He is deemed to be especially qualified for his new post by his long service as a member of the Board of Regents of the State of New York, which is the policy-making body as to education and the educational institutions within the State. As he is a life-long Democrat repeatedly importuned to accept a nomination for the highest offices within the gift of his party, his selection is regarded as removing the commission's inquiry from the partisan atmosphere in which the demand for a new State University originated. The other lawyers on the commission are former Justice Daniel J. Kenefick, of Buffalo, at one time President of the New York State Bar Association, member of the American Bar Association since 1923; George J. Mintzer, of New York and Los Angeles; and Joseph Carlino, of New York.

● The mid-summer President of migratory Security Council of the United Nations was the tall, lean, angular, scholarly delegate from The Netherlands, DR. EELCO VAN KLEFFENS, who also was the representative of his country in the United Nations Commission on Atomic Energy during this stirring period.

DR. EELCO VAN KLEFFENS

This well-trained lawyer and seasoned diplomat had been in the Security Council from the first, and had shown a capacity for quiet, incisive statement which went to the core of great controversies. Thoroughly schooled in international law and deeply devoted to the course of peace, his administration of one month in the rotating presidency was distinguished by a firmness, tact, and quick grasp of parliamentary situations, quite beyond what one might expect from his appearance of rather detached studiousness.

DR. VAN KLEFFENS was born in 1894, in Heerenveen, Friesland, in the northern part of The Netherlands. He studied at Groningen and The Hague, and received his doctorate in law from the University of Leyden in 1918.

DR. VAN KLEFFENS has been active in international affairs during nearly all of his adult life. In 1919, he became a member of the Secretariat of the League of Nations. He left the League in 1921 to take a position in the London office of the Royal Dutch Shell Oil Combine, but returned to the Netherlands the following year to become the Assistant Chief of the Bureau of Judicial Affairs in the Netherlands Foreign Office. Two years later he was made the head of that important department. In 1927 he was transferred to the Bureau of Diplomatic Affairs, as its Assistant Chief, and was named as its Chief in August of 1929. Much of his time during this period was devoted to a thorough examination of the relationship between the Netherlands and its neighbor Belgium, as a result of which many long-standing causes of friction were finally removed and the relations between the two countries were materially improved.

While serving as Head of the Bureau of Diplomatic Affairs of the Foreign Office of the Netherlands, DR. VAN KLEFFENS was also Assistant Secretary-General for the Academy of International Law at The Hague, as well as Recorder at the Court of Arbitration for the Interpretation of the Dawes and Young Plans. During the summer of 1939, he was appointed as the Netherlands Minister to Switzerland, but before he had time to take that post, he was recalled by Queen Wilhelmina to serve as Minister of Foreign Affairs. This was in the momentous month before the outbreak of World War II.

In the early morning after the German attack on Holland on May 10, 1940, DR. VAN KLEFFENS flew to London and Paris to ask for all possible military and naval assistance to his country. It could not be given him; and he was unable to return home, because the Nazi invaders had already penetrated the periphery of The Hague. Three days later the Queen and the remaining members of the Cabinet left the Netherlands for London. During the war years which followed, DR. VAN KLEFFENS visited the United States twice and, before Pearl Harbor, flew to the Netherlands East Indies. He has published several books, among them *Juggernaut of Holland*, an account of the black days of the German invasion.

● Our readers will be interested to know something of the personality and professional career of BEN W. PALMER, of Minnesota, whose contributions to our columns have been widely read and commented on, and in some of their contents have been productive of controversy as well as commendation, as the "Letters to the Editor" in this and prior issues attest.

BEN W. PALMER

At the age of 57, PALMER is a lawyer in active practice in Minneapolis. He was graduated from the University of Minnesota in 1911, and received his degree in law *cum laude* from the same institution in 1913, his M. A. degree following in 1914. For two years he was an instructor in political science, and then began the practice of law.

He has been the president of the Hennepin County Bar Association, the University of Minnesota Alumni Association, and the American Interprofessional Institute, and has been Historian-General of the Sons of the Revolution. His membership in the American Bar Association dates from 1923.

In his home city, PALMER has served on the Minneapolis Charter Commission and the Minnesota Crime Commission, and has been a member of the Minneapolis Public Library Board since 1933. He is a

member of the Minneapolis State Bar Association. He has been a lecturer at the University of Minnesota for many years and a teacher of constitutional law in night classes.

As our readers will attest, PALMER has a flair for writing and for research, and for incisive expression of his views. He is the author of *Marshall and Taney: Statesmen in the Law* (University of Minnesota Press—1939) and of the *Manual of Minnesota Law,* of which the West Publishing Company has published editions in 1929, 1936, and 1946. He has also written McGraw-Hill textbooks on business law.

His article in our present issue is hardly controversial, but its two predecessors have been provocative in some respects, as they dealt boldy with fundamental issues of the philosophy of law and government, on which men differ deeply and sincerely. Replying to a criticism published this month in "Letters to the Editor", PALMER gives there a brief elucidation of what he meant to point out as to Mr. Justice Holmes and other jurists of that school. Our readers will of course form and hold to their own opinions concerning this great debate as to "natural law".

● The *Congressional Record* may not be the favorite news medium of many members of the profession, but when a practising lawyer makes an address in behalf of one of the principal objectives of the American Bar Association and his presentation of the subject is printed in full in the *Congressional Record,* that is news.

JOHN G. BUCHANAN

The address of JOHN GRIER BUCHANAN, of Pittsburgh, as President of the Pennsylvania Bar Association, in behalf of American acceptance of the jurisdiction of the World Court as obligatory, which was published in our August issue ("Servants at Law"; 32 A.B.A.J. 446-450), was at once recognized, by friends of the Court in Congress, as a notable contribution to the current discussion. So they brought about its publication in the *Congressional Record* (79th Congress, July 11, 1946, Vol. 92, No. 135, Appendix A—pages 4256-58).

During the last month of the Association's efforts for the passage of the Morse Resolution (S. Res. 196), BUCHANAN was a tower of strength, as he has long been for other objectives of the organized Bar. He was one of the spokesmen for the Association at the hearing on July 11-12 before the sub-committee of the Senate's Committee on Foreign Relations, which is reported elsewhere in this issue. Then he conducted a vigorous one-man campaign among his friends in the Senate, to persuade votes for the Resolution. It all helped.

BUCHANAN was born in Allegheny (now a part of Pittsburgh) on July 24, 1888. He attended Shady Side Academy, was graduated from Princeton in 1909 and from the Harvard Law School in 1912. Admitted in that year to the Pennsylvania Bar, he was for four years an associate of the firm of Gordon and Smith; since 1916, a member of that firm and its successors, now Smith, Buchanan and Ingersoll. During World War I, he served as a 1st Lieutenant, later as a Captain, on the staff of the Judge Advocate General. From 1914 to 1937, aside from his time in the Army, he was a professor of law (part time) at the University of Pittsburgh.

He has been a member of the American Bar Association since 1919, and has served it in many capacities. He was a member of the House of Delegates in 1937-38, 1940-41, and 1944-46, and has taken an influential part in its floor debates. In 1943-1945, he was the Chairman of the Committee on Jurisprudence and Law Reform. He has been President of the Allegheny County Bar Association, and of the Pennsylvania Bar Association and a member of the Council of the American Law Institute, as well as a member of the Procedural Rules Committee of the Pennsylvania Supreme Court.

● The new Chairman of the Securities Exchange Commission is JAMES J. CAFFREY, a native of Boston, now resident in Larchmont, Westchester County, New York. Edmond M. Hanrahan, the "Wall Street lawyer," was not elected Chairman, as had been expected when he was named to the Commission (32 A.B.A.J. 514).

JAMES J. CAFFREY

The SEC is supposed to choose its own chairman from among its members. Strange to say, this time it did, without any word from the White House. This unforeseen autonomy led to two long sessions before the choice was announced.

CAFFREY is 48 years old, was graduated from Harvard College in 1919 and from Suffolk University in law in 1923. He was in the general practice of law in Boston until 1935. Then he became a trial attorney for the NRA but soon joined the staff of the SEC, and served later for nine years as regional administrator of its Boston and New York offices. Like Ganson Purcell, whom he succeeds as Chairman, CAFFREY has risen from the ranks of its staff to its highest post. In April of 1945, he was promoted to membership in the five-man commission. His designation to this office is said to have been the last appointment made by President Franklin D. Roosevelt.

The senior member of the SEC is former Judge Robert E. Healey, of Vermont, who has been chairman of the American Bar Association's Section of Public Utility Law. The statute requires this Commission to be bi-partisan in personnel, but no member of the minority party in its make-up has ever been chosen as Chairman. The other members, besides CAFFREY, are Robert K. McConnaughey, Richard B. McEntire

(32 A.B.A.J. 422), and Edmond M. Hanrahan (32 A.B.A.J. 514). CAFFREY's selection is regarded as a victory for those of the SEC and its staff who oppose any "liberalization" of its policies.

● Probably the most controversial figure in the Congress — hated and lampooned by the "left-wing" press and its followers but respected and loved by many members of the House of Representatives and by many others who know him — is HOWARD WORTH SMITH, of the Alexandria district in Virginia. More than any other leader in the House he has earned, and receives, the criticism and opposition of CIO-PAC labor forces, the defenders of absolutism in the administrative agencies, and the apologists for the infiltration of Communistic concepts among those holding office under the government of the United States. He has fought them all, and they have made common cause against him.

HOWARD WORTH SMITH

"Judge" SMITH has been staunch and successful in representing the people of his district and the Dominion State. He was born in Broad Run, Virginia, on February 2, 1883. He entered the University of Virginia in 1899, and received his degree in law in 1903. For twenty years he practiced law, did some banking, and ran a large dairy farm. Then he became a judge of the Corporation Court in Alexandria in 1922. Six years later he was elected a Circuit Judge in the Virginia State Courts.

Washington and the dome of the Nation's Capitol were almost within sight — only seven miles away. It seemed very convenient for "the Judge" to go to Congress. So he left the bench and was elected to the House in 1931. He has risen steadily in leadership and influence, has been a large factor in a great deal of noteworthy legislation, and has long been a member of the powerful Rules Committee.

Meanwhile, Alexandria and SMITH's district had been filling up with office-holders from Washington, many of whom decided to vote there to help beat this "reactionary." John L. Lewis is one of Alexandria's best known residents. Many employees of the administrative agencies and the departments had moved to the district to escape the housing shortage or for other reasons. "The Judge" was made one of the chief targets of the "purge." Natives of his district and State were proud of his independence and courage; they rallied to his support, and re-nominated him about four to one.

There is nothing sensational or florid about this "old-fashioned" lawyer's work in the Congress. His speeches are quiet appeals to reason. At the age of 62, he holds to his course, with a stubborn, conscientious conviction that he and his State are right. Lawyers, like other citizens, differ in their opinions about that and about him. His legislation has been highly controversial, and a lot of it failed to become law because it was vetoed. SMITH contributed by invitation to the JOURNAL in 1942 (28 A.B.A.J. 4-7) an exposition of one of his early attempts to curb abuses under the National Labor Relations Act, to which Emil Schlesinger, of the New York Bar, replied (28 A.B.A.J. 7-19).

● A member of the American Bar Association who, as a Senator of the United States, made a long and brilliant fight for the accomplishment of one of the Association's principal objectives, is WAYNE L. MORSE, of Oregon, author of S. Res. 196, to authorize the filing, by the United States, of a Declaration under Article 36 of the Statute of the International Court of Justice, accepting as obligatory the jurisdiction of the Court over legal disputes with nations which have filed like declarations.

WAYNE L. MORSE

Born in Madison, Wisconsin, in 1900, MORSE, obtained his Ph.B. there in 1923 and his law degree at University of Minnesota in 1928. He taught public speaking and argumentation at the University of Wisconsin and the University of Minnesota, and went west to teach law at the University of Oregon. At the age of 30 he became the Dean of the University of Oregon Law School.

After twenty years in academic life, he became an arbitrator under the United States Department of Labor, as to the troubled maritime industry on the Pacific Coast. It is said that from 1936 to 1939 he settled or determined some forty-one labor disputes. In any event, he was brought to Washington to be a "public" member of the National War Labor Board, and attracted national attention in that capacity. When he resigned to enter the Republican primaries as a candidate for the nomination for the United States Senate, President Roosevelt praised him for his "great industry, vigorous thought, and enlightened point of view."

To the surprise of many observers, he won the nomination handily and romped away with the election in 1944 when the electoral tide was against his party. In the Senate, he has steered a course which is truculent or independent, according to whether you like it. He has not hesitated to tread on the toes of seniors, or to harangue or denounce leaders or policies of his own party as well as of the majority party. Such a course has not made this lawyer popular with leadership of either party, but he has stuck to his guns as "a fighting liberal."

Whatever may be said or thought about his course on many things, MORSE made a good fight on the World Court issue, and rallied for his resolution an impressive list of joint sponsors in both parties (32

A.B.A.J. 27-28). His address in behalf of American adherence to the Court, delivered in the Senate when the United Nations Participation Act was pending last fall (32 A.B.A.J. 25, 44-45) was one of the ablest utterances on the subject in many years. He worked in cooperation with the representatives of the American Bar Association, which he had joined in 1935. Finally, the Senate Committee on Foreign Relations granted a subcommittee hearing on July 11-12 on his resolution. The American Bar Association's Committee and other organizations made a strong showing for action without further delay. President Truman and the State Department made known their support. The report by the Senate Committee unanimously recommended action before the Congress adjourned. As reported elsewhere in this issue, the Resolution was amended in two respects, but adopted by a vote of 60 to 2. MORSE is given great credit for his vigorous and successful sponsorship of the Resolution.

● The Chairman of the Governor's Conference, made up of the Governors of all the States, is MILLARD FILLMORE CALDWELL, JR., the lawyer who is the Governor of Florida and has been a member of the American Bar Association since 1941. In behalf of the Conference, this native of Tennessee was in Washington during July, to urge that the Senate pass H.J.R. 225 to relinquish to the State governments any claim of the Federal government to title to the mineral deposits in tidelands or navigable waters within State jurisdiction. CALDWELL knew his way around Washington well enough, since he had been there as an effective member of the 73rd to 76th Congresses (1933-41), representing the Third Florida District, until he retired voluntarily to resume the practice of law at Milton and Tallahassee, Florida.

MILLARD FILLMORE CALDWELL, JR.

The House of Representatives had passed the "tidelands" bill last September with but eighteen dissenting votes, but the majority leadership stalled it in the Senate, despite the efforts of Senator Pat McCarran, Chairman of the Committee on the Judiciary, who had introduced the companion bill. The recent meeting of the Conference in Oklahoma City found the Governors all stirred up about the delay and threatened invasion of property rights of their states. By a formal vote the Governors declared, virtually as one voice, that "The stability of State economy, the perpetuation of State sovereignty and the protection due countless investors, bondholders, and lessees and successors in title of the several States, necessitate immediate and effective legislative relief in quieting the titles of the several States to lands beneath tidal and navigable waters."

The alarm of the States was due to the fact that Secretary Harold L. Ickes, while in office, had instituted a test case to establish Federal title to these lands under water and to the oil and mineral deposits in them. This suit would come before the Supreme Court this fall, unless the Congress negatived the Federal claim. The States feared that the present Court would sustain the Administration's claim. So the governors wanted their chairman to get some action.

CALDWELL came to Washington, saw President Truman, and "got busy" on the bill. He found Majority Leader Barkley vehemently urging that since the question of title was to be before the Supreme Court it would be unseemly for the Congress to take action meanwhile. The Governor's reply was that the question did not belong in the Court, that the Federal claim was a ruthless "grab" as a part of warfare on State rights, and that the Congress as the policy-making body concerning lands and rights which the Federal government does own now, owed the duty of repudiating the "raid" on property of the States.

"Until recently, no question has ever been raised relative to the States' title to these lands," the Florida Governor told the Senators. "It has always been recognized by the Supreme Court in numerous decisions and by the public that title to these lands rested in the States. Now that the question has been raised, the Governors' Conference and the States are simply urging that the matter be settled, and settled definitely."

Of course, he wanted the question settled one way and by the Congress in favor of the States, and not left to the Supreme Court. So Senator McCarran moved that the Senate take up the bill. This was carried by a roll-call vote of forty-six to twenty, with party lines broken. Parliamentary maneuvers by the majority leader nevertheless entangled the bill in the legislative jam before adjournment, although a majority in both Houses were strongly for it. Finally, its managers forced it to a vote, and it passed the Senate by a ten-vote margin. President Truman promptly vetoed it, on the day before adjournment. The House voted 139 to 95 to pass the bill over the veto, but this was less than the two-thirds required.

CALDWELL was born in Knoxville, Tennessee, in 1897. He attended Carson and Newman College and the University of Mississippi, and went into World War I as a private and came out as a 2nd Lieutenant. After the war, he finished his education, including law, at the University of Virginia. He was admitted to the Tennessee Bar in 1922. Removing to Florida he became a member of its Bar in 1925. He served as prosecuting attorney and county attorney of Santa Rosa County and as city attorney of Milton. After four years in the Florida Legislature, he was elected to Congress. In 1938 he was an American Delegate to the Inter-Parliamentary Union at The Hague, and in 1939 at Oslo, and was a member of the Executive

Council of the American group. After declining re-election to Congress, he was practicing law, principally in Tallahassee where he lives, when he was elected Governor.

He has been active in the Florida State Bar Association, and has followed closely the work of the American Bar Association.

● American lawyers are looking forward to the return here this fall of RENE CASSIN, the distinguished French lawyer who has been so bold and exemplar of the highest traditions of the Bar of France and so sound a counsellor of policy in the United Nations. His career shows a breadth and depth which American lawyers could well set as the goal of legal education and preparation.

RENE CASSIN

DR. CASSIN was born in Bayonne, in the south-west of France, on October 5, 1887. His preparatory studies were in Nice. In 1908 he received his law degree from the University of Aix and became a lawyer in Paris. His doctorate in law was bestowed by the Faculty of Law in Paris in 1914. During the first World War, he fought in the 311th Regiment (infantry) and for his bravery was decorated with the Military Medal, Croix de Guerre. Honorably discharged from the Army because of wounds, he was appointed to the Faculty of Aix in 1916, and advanced to assistant professorship in 1919. He next was professor of law at the Faculty of Law in Lille. In 1929, he was appointed to the chair of Civil Law at the Faculty of Paris, and at the same time he obtained a professorship in the National School of France Overseas (Graduate School for Colonial Administration).

From 1924 to 1938 DR. CASSIN served with distinction as one of the French delegates to the League of Nations. He also served as honorary president of the Federal Union of War Veterans, of which he was one of the founders. During this period, he wrote many highly regarded books on Civil Law, the League of Nations, the Kellogg-Briand Pact, the World Court at The Hague, etc., and taught several times at the Academy of International Law at The Hague.

He also undertook numerous missions to universities in Europe, the Levant, Egypt, Indo-China, and China. Long noted for his warnings against the latent menace of Germany, and later of Nazism, he was the first civilian who left Bordeaux to respond to General de Gaulle's appeal for the aid of French leaders in maintaining a government in exile. Arriving in London on June 28, 1940, DR. CASSIN immediately took an important part in the drafting of the historic Churchill-De Gaulle agreement.

He was active in the organization and the administration of the Fighting French *Mouvement*—first as a member of the *Conseil de Defense de l'Empire*, then as National Commissioner for Justice and Public Education in September of 1941. President of the Juridical Committee attached to the French Committee of National Liberation in Algiers (1943), he was also a member of the French Consultative Assembly in Algiers. He was appointed Vice President of the *Conseil d'Etat* in November of 1944, and, in 1945, became the President of the Board of the National School of Administration founded by the French Government in that year. A member of the French delegation to the United Nations Cultural Conference in England in November of 1945, he received on that occasion the degree of Doctor *Honoris Causa* from Oxford University.

DR. CASSIN came to New York in May of this year as French expert for the United Nations' Commission on Human Rights, and was a sagacious adviser as to the practicalities of that complex project. He was warmly greeted by his many friends of prewar years in the American Bar, who anticipate his coming again this autumn.

Practising lawyer's guide to the current LAW MAGAZINES

CONFLICT OF LAWS—*"Conflict of Laws in the Federal Courts: The Erie Era":* When the Supreme Court in *Erie R.R.* v. *Tompkins,* 304 U. S. 64 (1938), reversed the decision in *Swift* v. *Tyson,* 16 Pet. 1 (U. S. 1842), and thereby abrogated the authority of the Federal Courts to determine independently, as against the common law of a particular State, matters of general jurisprudence, it was anticipated that the sought-for uniformity between State and Federal decisions in a given locality, would require numerous additional "clarifying" pronouncements by the high Court. The importance and the cumulative effects of these sequels to *Erie R.R.* v. *Tompkins* are weighed in the article, entitled as above, in the April issue of the *University of Pennsylvania Law Review* (Vol. 94—No. 3; pages 293-311), contributed by Paul A. Wolkin, of the Pennsylvania Bar and prepared originally for the Practising Law Institute. He concludes that subsequent decisions have applied consistently the principle enunciated in the *Tompkins* case and that conventional conflict of law standards have not been permitted by the Supreme Court to impede the progress towards full realization of the objective of uniformity. (Address: University of Pennsylvania Law Review, 3400 Chestnut Street, Philadelphia 4, Pennsylvania; price for a single copy: 75 cents.)

CONSTITUTIONAL LAW—*"The Sources and Limits of Religious Freedom":* A valuable discussion of the constitutional guarantee of religious freedom is in the May-June issue of the *Illinois Law Review* (Vol. XLI—No. 1; pages 53-80), under the above-indicated title. The author, Clyde W. Summers, formerly a Professor of Law at the University of Toledo, states that there has been conflict in recent years between our ideals and our practical conduct, which has resulted, not from lack of adherence to the abstract principle of religious freedom, but from inability to translate the abstract term into concrete applications. His analysis leads him to the conclusion that the Courts have relied, in the main, upon three grounds for the protection of religious freedom — the "historical" argument, the "political process" argument and the "protection of minorities" argument. He also sets forth his reasons for concluding that, of the three, the "protection of minorities" argument is the most useful in deciding "freedom of religion" cases. The author further expresses his view that, if it is made certain that personal freedom shall not be interfered with except where there is an extremely serious and immediate threat to public safety, an effective economic and political order may be built within a framework of freedom. (Address: Illinois Law Review, 357 East Chicago Avenue, Chicago, Illinois; price for a single copy: $1.)

CORPORATIONS: *Noteworthy Decisions in the Law of Private Corporations 1940-1945:* Professor Alexander Hamilton Frey, of the Faculty of Law at the University of Pennsylvania, contributes as the leading article in the April issue of that University's *Law Review* (Vol. 94—No. 3; pages 265-292) his summary of significant decisions in corporation law during the war years. It would be difficult to overestimate the help which has so generously been given, to returned veterans and to others, whose minds have not been concentrated on law or decisions during the war period by these "refresher" articles which have been so laboriously produced by law professors already burdened with their own and their law school's problems of readjustment. Beyond that, the synthesis of a five-year review in the respective fields has generally given excellent means of measuring what the war has done to the law and what has been done to the law during the war. Practising lawyers owe a lasting debt to the teachers who have come to the rescue with these surveys, at such sacrifice of their leisure.

A recognized authority in the field of corporate law, Professor Frey's commentary is notable for its careful analysis of the principle decisions during the five-year period and his grouping of them under the general headings identifying them with the main divisions of corporation law. He concludes that "there is today one dominant problem in the realm of private corporations with which the courts are constantly being confronted; namely, the relationship between a corporation's managers and its shareholders." He seems to regret the decisions which have restricted the scope or operation of minority stockholders suits although he recognizes that the so-called "strike suit" has become especially prevalent in recent years. (Address: University of Pennsylvania Law Review, 3400

Editor's Note.

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the JOURNAL *will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.*

Chestnut Street, Philadelphia 4, Pennsylvania; price for a single copy: 75 cents.)

CRIMINAL PROCEDURE – *"The New Federal Rules of Criminal Procedure: I"*: The first of a series of articles on the new Federal Rules of Criminal Procedure, by George H. Dession, Lines Professor of Law at Yale University and a member of the Supreme Court's Advisory Committee on Rules, is in the June issue of the *Yale Law Journal* (Vol. 55 – No. 4; pages 694-714). Professor Dession explains in detail the history and policy of these new Rules, as well as their general scope and application, and then proceeds to a discussion of preliminary proceedings under the Rules, dealing specifically with the complaint, the warrant or summons upon the complaint, and proceedings before the Commissioner. In this latter connection, it is indicated that the "controversial problem as to how long an arrested person may be detained prior to arraignment for questioning and investigation is left about where it was by the provision in Rule 5(a) that the arresting officer 'shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States';" and that the "history-making policy laid down by the Supreme Court in *McNabb* v. *United States* [318 U.S. 332] and subsequent cases, to the effect that admissions or confessions obtained from a suspect while he is being held prior to and without prompt arraignment shall not be admissible in evidence, therefore remains in full force." (Address: The Yale Law Journal, Yale Station, New Haven, Connecticut; price for a single copy: $1.25.)

DOMESTIC RELATIONS–*"The Nature of the Promise to Marry–A Study in Comparative Law"*: In 1935 a movement for legislative reform was begun which has resulted in the abolition by fifteen States of the action for breach of promise to marry. The May-June issue of the *Illinois Law Review* (Vol. XLI–No. 1; pages 1-26) carries an account of the historical and social setting of the promise to marry, in the United States and in other countries, which should be of interest to attorneys, even if their practice is limited to one or more of those fifteen States. The author, W. J. Brockelbank, Professor of Law at the University of Idaho, notes that English and American courts have treated the promise to marry as a contract which, when breached, gives rise to an action for damages, but that many courts and authors state that most of the damages are allowed on the theory of tort. An interesting analysis is presented as to the limitations which other countries have placed upon the right to recover damages for breach of promise. The second and concluding part of Professor Brockelbank's article, to be published in a subsequent number of the same review, will examine the nature of the promise to marry, study the situation in both States which have, and the States which have not, adopted "heart-balm" legislation, and propose a model curative statute. (Address: Illinois Law Review, 357 East Chicago Avenue, Chicago, Illinois; price for a single copy: $1.)

DOMESTIC RELATIONS–*"Pater Familias–A Cooperative Enterprise"*: An article by Harry M. Fisher, who is a Judge of the Circuit Court in Cook County, Illinois, is in the May-June issue of the *Illinois Law Review* (Vol. XLI–No. 1; pages 27-52) as a part of a symposium on "Scientific Proof and Relations of Law and Medicine". Judge Fisher traces the evolution of human thought as to parental responsibility from the early days, when the power of the father was absolute and infanticide, for religious or economic considerations, was sanctioned by law, to modern times when the emphasis is upon the duties of the parent. The author notes that, while the early American courts gave lip-service to the doctrine that the father is primarily entitled to the custody of his children, the father's right is generally ceded voluntarily or by compulsion to the mother when separation occurs. The establishing of free public schools with compulsory attendance requirements and the creation of juvenile courts are stated to have been great strides toward the goal of a healthier, happier and more useful younger generation. Judge Fisher observes that nevertheless the job is not yet complete, and argues for an even greater cooperation between parents and the State, and for a partnership of the medical and legal professions dedicated to the building of a better world for our children. (Address: Illinois Law Review, 357 East Chicago Avenue, Chicago, Illinois; price for a single copy: $1.)

JUDGMENTS–*"Federal Relief From Civil Judgments"*: An excellent exposition of the grounds and procedural remedies for obtaining relief from civil judgments in the Federal Courts, particularly under Rule 60 of the Federal Rules of Civil Procedure, is set forth in the leading article of the June issue of the *Yale Law Journal* (Vol. 55–No. 4; pages 623-693), by Professor James Wm. Moore and Elizabeth B. A. Rogers, a member of the third-year class in the Yale Law School. The article is comprehensive and deals with the background of Rule 60, its express provisions, the Federal decisions thereunder and the California decisions interpreting Section 473 of the California Code from which Rule 60(b) was adapted. In addition, an appraisal is given of the scope of Rule 60(b) as now interpreted, including a valuable discussion of the remedies available under the first saving clause of the Rule and based on former procedure, as well as a comparison of Rule 60(b) as now interpreted with the State practice, using the statutory and decisional law of the State of New York as the basis for the comparison. Although the authors conclude that the Federal Rules which affect the finality of judgments have

worked well in practice, they point out ambiguities and structural weaknesses which have been developed and revealed, and offer specific recommendations and changes to overcome these deficiencies. (Address: The Yale Law Journal, Yale Station, New Haven, Connecticut; price for a single copy: $1.25.)

MEDICAL JURISPRUDENCE—*Symposium on Scientific Proof and the Relation of Law and Medicine—"Medicolegal Photography" and "X-Ray Pictures as Evidence":* Articles entitled as above and written by Charles C. Scott discuss most helpfully the use of photographs as evidence in connection with medical testimony, in the trial of a lawsuit. "Medicolegal Photography" in the April issue of the *Rocky Mountain Law Review* (Vol. 18—No. 3; pages 173-239), is a brief but comprehensive presentation as to all types of photographs as evidence. The author deals with the basic principles of photography, gives definitions of the terminology as to photographs, and states and elucidates from the decided case the basic rules of governing the admissibility of all photographic evidence. Several sections treat separately the several kinds of photographs availed of in connection with medical testimony. (Address: Rocky Mountain Law Review, Boulder, Colorado; price for a single copy: $1.) The second article, "X-Ray Pictures as Evidence" was in the April issue of the *Michigan Law Review* (Vol. 44—No. 5; pages 773-796). Here Mr. Scott discusses the means and basic principles of utilizing X-Ray photography in court, from the selection of the proper technicians and equipment for medical X-Ray work down through the technique of picture-taking in X-Ray work. The article concludes with a well-documented discussion of the problems related to the admissibility of X-Ray photographs in evidence. (Address: Michigan Law Review, Hutchins Hall, Ann Arbor, Michigan; price for a single copy: $1.).

TRUSTS AND ESTATES—*Impact of Taxes—"Estate Planning—a New Legal Science":* Edward N. Polisher, of the Philadelphia Bar, a special lecturer at Dickinson Law School, has written this instructive article in the *Dickinson Law Review* for June (Vol. L—No. 4; pages 113-132). He deals with the effect of social and economic changes upon the function of the lawyer in advising clients as to the disposition of their property by will or deed of trust, and lays emphasis on the devastating changes wrought by the tax laws under the pressures for revenue. Much of the material is fairly familiar to most lawyers in our tax-conscious society, but the author gives a useful compilation of information and suggestions which attorneys should have clearly in mind in giving advice as to the disposition of property. Chief stress is laid upon the Federal estate tax and its many ramifications as regards gifts and legacies. (Address: Dickinson Law Review, Carlisle, Pennsylvania; price for a single copy: 75 cents).

UNFAIR COMPETITION—*"Damages and Accounting Procedure in Unfair Competition Cases":* Because the rules of damage in unfair competition actions were evolved from and predicated on the prevalence of methods of merchandising that were fundamentally different from those obtaining in the Anglo-American economy of today, the likelihood that the modern "trade pirates" will have to pay substantial damages for their infractions of fair play may be regarded as remote. Such is the view of the authoritative Harry D. Nims, Esq., of the New York Bar, in the excerpt entitled as above from the forthcoming fourth edition of his standard treatise on *Unfair Competition and Trade-Marks*, which is in the June issue of the *Cornell Law Quarterly* (Vol. XXXI—No. 4; pages 431-465). A second and final installment under the same heading is to appear in the September issue. Limited to exposition and criticism of the damage rules and their application in court decisions, the first installment seems somewhat discursive, but Mr. Nims always writes from the practical viewpoint of the trial lawyer and the counsellor confronted with concrete problems as to clients' business. He does offer help as to the accounting procedures and proofs of recoverable damages. Presumably in his concluding part, the learned author will summarize more succinctly the prevailing rules and offer specific suggestions as to possible improvements by way of legislation or judicial innovation. Or maybe we shall have to wait for the new edition of his book. (Address: Cornell Law Quarterly, Ithaca, New York; price for a single copy: $1.).

Judicial Salaries

(Continued from page 583)

Federal judges were. The resultant problems are serious ones for the managing partners of large law offices; but little or nothing can be done about the matter, for the average practitioner, until taxes are reduced.

At the hearings before the Committees of the Congress, Attorney General Tom C. Clark strongly urged the increase in judicial salaries, on the ground that without it he was finding it impossible to persuade the type of lawyers he wanted to permit the submission of their names as recommended nominees for appointment to the bench. The increase having now been made effective, the responsibility is upon the President and the Attorney General, as well as upon the Senate, to see to it that the higher compensation does in fact lead to the nomination and confirmation of lawyers who have a greater capacity and experience as lawyers, and a demonstrated independence and impartiality.

The objective will not be accomplished if judicial selections are made on a partisan political basis, as rewards to men who would have been sufficiently attracted by the salaries paid since 1926. To take partisan politics out of the processes of judicial selection, for both the Federal and State courts, should be the insistent demand of the organized Bar throughout the country. Through its new Committee on the Judiciary, the American Bar Association will no doubt be heard from in these respects.

Judicial Salaries in Canada

American lawyers will be interested in contemporaneous developments in Canada as to judicial salaries. As this issue of the JOURNAL goes to press, the budgetary measures pending in the House of Commons, with certainty of passage, provide for an increase of one-third in the amount of all salaries of judges throughout Canada, to be effective January 1, 1947. Under what may seem to Americans an anomaly, the provisions of Canada's organic law (the British North America Act) have been construed to vest in the Parliament of the Dominion the power to fix, on a uniform basis for the corresponding courts, the salaries of all judges of all courts in Canada, both Dominion and Province, although the Provincial legislatures have the authority to fix or change the jurisdiction of Province courts. The cost of all judicial salaries throughout Canada, in Dominion or Province courts, are borne by the Dominion budgets, instead of payment by the Province for the cost of their own courts. This has taken place despite the facts that Sections 90 and 91 of the British North America Act have been construed strongly in favor of the autonomy of the Provinces as to "trade", etc., and generally as to matters which in the United States have been centralized in the national government under the "commerce" clause, etc. The Dominion has gone further than other countries in providing a pension for the widows of its judges, as well as retirement provisions; but by some quirk of construction the consent of a Province is required for the Dominion allowances to judges after retirement.

As in the United States, the Canadian Bar Association has actively supported the thirty-three and one-third per cent increase in the salaries of all Dominion and Province judges, the enactment of which is assured.

Notice to Members

The Committee on Hearings will meet at ten o'clock on October 26, 1946, in Atlantic City to hear those interested in the complaint of Henry C. Friend, of Milwaukee, Wisconsin, and Marc J. Grossman, of Cleveland, Ohio, (See 32 A.B.A.J. 462) relative to the amended advisory opinion No. 255 of the Committee on Professional Ethics and Grievances referred to the Committee on Hearings.

A stenographic report of the hearings will be made and submitted to the House of Delegates.

Tax Notes

Prepared by Committee on Publications, Section of Taxation: Mark H. Johnson, Chairman, New York City, William A. Blakely, Dallas, Texas, Philip Bardes, Howard O. Colgan and Martin Roeder, New York City, Allen Gartner, Washington, D. C., and Edward P. Madigan, Chicago.

Section 722 Procedure

The new Bureau procedure for the administration of excess profits abnormality claims has been outlined in a Commissioner's mimeograph (Mim. 6044, July 31, 1946), and in the first ruling of the newly-created Excess Profits Tax Council (E.P.C. 1, I.R.B. 1946-17-12371). The following is a brief outline of that procedure:

1. The case will in the first instance be examined by an examining agent in the field division of the Income Tax Unit. This agent will be specially trained for Section 722 cases, and will be under the direct supervision of a member of the "Section 722 Field Committee" in his division.

2. The report of the examining officer, after approval by the Committee member, will be submitted to the chairman of the Committee. After the chairman's approval, a copy of this report will be the basis of a special 30-day letter to the taxpayer.

3. The taxpayer may then have a conference, conducted by a member of the Committee, in the field division office.

4. If the taxpayer and the Committee are unable to agree, the field record will be certified to the Excess Profits Tax Council for consideration. At this point the case is in charge of a conferee in the conference group of the Council, assisted by a member of the technical office of the Council, and under the supervision of a Council member. Council conferences will generally be held in Washington, and may be reviewed by a single member, by a panel of three or more members, or by the entire Council.

5. If the taxpayer and the Committee have agreed, the case will be reviewed by the review group of the Excess Profits Tax Council, under the supervision of a member of the Council. If the Committee recommendation is rejected by the Council, the taxpayer will be notified of the reasons, and will have the opportunity for a Council conference.

6. The Technical Staff will have jurisdiction of all 90-day and docketed cases, but will not disturb the decision of the Council except in unusual circumstances, and then only with the concurrence of the Council.

7. If the taxpayer does not accept the decision of the Council, it may appeal to the Tax Court.

Tax Court Disregards Clifford Regulations

It is unusual for the Tax Court to impose a tax when the treasury regulations state that none is due, but that result seems to be developing in connection with the taxation of a grantor upon trust income under the *Clifford* rule. The Treasury, at the end of 1945, promulgated new regulations on this subject, in an attempt to substitute precise tests for the vague and conflicting rules which had been painfully developed by the courts. In several important respects these regulations are more liberal than the court decisions. A good example is *Louis Stockstrom*, 3 T.C. 255, aff'd on this issue 148 F. (2d) 491, where the grantor was held taxable because (1) he retained broad administrative powers as trustee, and (2) he reserved the power to accumulate or distribute the trust income for the named beneficiaries. So far as the facts appear, the grantor would not be taxable under the regulations.

The case was remanded to the Tax Court by the Eighth Circuit, on an issue not considered by the Tax Court. Before the new trial, the taxpayer obtained a substitute mandate from the Circuit Court which permitted the Tax Court to reconsider its decision in light of the regulations. On the new trial, however, the Tax Court refused to decide whether the regulations would require a contrary decision, because it was convinced that its own decision was correct. The regulations, said the court, do not have the effect of law; they are merely "the Commissioner's present construction of the statutory provisions here applicable". (7 T.C. No. 32.)

True, the regulations themselves are stated to be applicable only to taxable years beginning after December 31, 1945. The *Stockstrom* case involved the years 1938-1941. But, in Mim. 5968, the Commissioner announced that he would not impose the tax for prior years in conflict with the regulations, so long as "no inconsistent claims prejudicial to the government are asserted by trustees or beneficiaries". In view of the Tax Court's decision, however, this is now purely a matter of administrative grace, and the Tax Court may ignore this ruling if the case reaches that tribunal. The question still remains, however, whether the Tax Court may ignore the regulations in a case for the year 1946, if the regulations are favorable to the taxpayer. See *Helvering* v. *Reynolds Tobacco Co.*, 306 U.S. 110.

Deduction for Federal Stamp Tax

Under the 1943 Act, effective for taxable years beginning after December 31, 1943, no deduction is allowed for Federal import duties and Federal excise and stamp taxes, except as the amount is allowable as

an "expense" under §23 (a). In the case of transfers or conveyances of securities or real estate, the Bureau has ruled that this exception applies only to "dealers". Other persons (including "traders") must treat the tax as an offset against selling price. I.T. 3806, I.R.B. 1946-13-12336. This rule is consistent with the treatment prescribed for selling commissions, which has been approved even under the 1942 income-production expense statute. See *Don A. Davis*, 4 T.C. 329, aff'd 151 F. (2d) 441, cert. den. Feb. 25, 1946.

The same ruling states that a bond issuance tax paid by a corporation is amortizable over the life of the bond. A stock issuance tax, however, is nondeductible because it is a permanent capital expenditure.

Letters to the Editors

To the Editors:

In the November (1945) issue of the *Journal*, Mr. Ben W. Palmer undertook to show parallels between Justice Holmes' philosophy and that of Hitler ("Hobbes, Holmes and Hitler," 31 A.B.A.J. 569). Considering it too extreme to merit serious attention, I ignored the article, as apparently did other readers. In the June (1946) issue, Mr. Palmer returns to this, apparently a favorite theme.

Mr. Palmer's denigration of one of the greatest Americans need not be accorded a reply, but he has evoked sufficient annoyance to justify a protesting footnote. I suggest that it is unseemly to attribute absolutist principles to a man who, dissenting in support of an unpopular cause, said in a historic case:

> . . . when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. . . . (*Abrams* v. *United States*, 250 U. S. 616, 63 L. ed. 1173 (1919)).

This is in the grand tradition of Milton and John Stuart Mill. Can Mr. Palmer cite a parallel passage from *Mein Kampf*? Does he suggest that Hitler would have gone to similar lengths to protect five obscure and penniless Jewish Communists?

"Free trade in ideas" is incompatible with absolutism. Justice Holmes' "absolutism" consisted, I assume, in the belief that the law, when ascertained, is the law, and is to be obeyed. Perhaps some of the complaints directed against him are attributable to his belief, a novel idea honored principally in theory up to a few years ago, that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts" (*Missouri, Kansas, & Texas Railway Co. of Texas* v. *May*, 194 U.S. 267, 48 L. ed. 971 (1904)).

I think there will be general agreement among practical men with Holmes' concept, quoted 31 A.B.A.J. 571, that "Sovereignty is a form of power, and the will of the sovereign is law because he has power to compel obedience or punish disobedience and for no other reason." To jump from this statement, as Mr. Palmer does in the next sentence, to the conclusion that Holmes' legal "philosophy" was "that might makes right," is a perfect *non-sequitur*, and a conclusion, moreover, which every significant act of the departed Olympian's judicial career disproves.

It is not without interest to note that a thoughtful and learned commentator arrives at conclusions diametrically opposite to Mr. Palmer's in respect to Holmes' "authoritarian" concept of law. Jerome Frank says in his book, *Law and the Modern Mind* (page 259: *"The great value of Holmes as a leader is that his leadership implicates no effort to enslave his followers."* (Italics Judge Frank's.) And again (page 260): "If, like Holmes, *we win free of the myth of fixed authoritarian law*, having neither to accept law because it comes from an authority resembling the father's, nor to reject it for like reason, we shall, for the first time, begin to face legal problems squarely." (Italics mine.)

I submit that a lawyer need not concern himself too much with the "natural law", whatever that is which Mr. Palmer so greatly admires—a concept, incidentally, which David Hume pretty thoroughly demolished two hundred years ago. For the purpose of determining what it is best to do or avoid, the last pronouncement of the legislature or of the court having jurisdiction is a safer guide than that offered by the most conscientious introspection or by any system of folklore. There is sound horse sense in the Holmes dictum: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by law." (Quoted in Frank, *Law and the Modern Mind*, page 124). The defense against totalitarianism which Mr. Palmer

properly desires to strengthen will be promoted not by self-deception as to the nature of law, but by seeking to improve the laws we have. The real complaint, I take it, is not that law is law and therefore binding, but that the law is, in some respects at least, bad. The basic difference between the Hitlers and the Holmeses is that the former prefer bad, the latter good laws. To find a parallel between views so diametrically opposed requires ingenuity, to say the least.

Mr. Palmer's comments on the case system (32 A.B.A.J. 332) evidence what seem to be misconceptions. He says,

> . . . Certainly the case system suffered from that overemphasis on analysis and of the 'is' at the expense of the 'ought' . . .

Anyone who has ever participated in or listened to a class room discussion in a law school where the case system is properly taught is likely to disagree with Mr. Palmer. Where leading cases representing divergent views of the courts respecting legal propositions are presented for study and comparison—where neither student nor teacher hesitates to overrule the Supreme Court of the United States or the House of Lords if he believes it to be wrong in principle—it is plain that the emphasis is on the 'ought' rather than the 'is.' The name "case system" is unfortunate, contributing to misunderstanding of the objectives sought—and within reason attained, as I believe—by this method of instruction in the law.

WALTER L. NOSSAMAN

Los Angeles, California

To the Editors:

In Mr. Nossaman's letter let me first take the case system. I am not unaware, of course, that "ought" comes into the classroom in criticism of cases. But (1) the criticism in many cases, while sharpening the intellect, all too often has produced no durable synthesized result because of the absence from many schools for many years of any accepted philosophy of law or of any philosophy. And (2) I submit to members of the Bar on the basis of their own experience, that except in the small fractional part of practice devoted to discussion, principally in appellate courts, of points not covered by decided cases in a given jurisdiction, the lawyer concentrates on what has been decided rather than what ought to be. This generally keeps him too busy for any systematic study of the philosophy of law and tends to make him drift into the camp of the pragmatists.

I am glad that I provoked Mr. Nossaman's letter if he and others will re-examine what I have written and note that I was not discussing Holmes the man—whose admirable qualities I attempted to indicate with an emphasis equal to that of a devotee—but the implications of his philosophy, implications to some extent inconsistent perhaps with his life or unsuspected by himself. And the fact that one may love a man makes it all the more imperative in the cause of truth rigorously to separate his philosophy from the man's personality and to see what it will lead to, rationally analyzed, and what its consequences have been. This is especially imperative in dealing with a man of the stylistic ability, influence and following of Mr. Justice Holmes. And to point out as others such as Roscoe Pound and Mr. Justice Jackson have—to take but two authorities at random—that scepticism, relativism, pragmatism and similar invertebrate philosophies or pseudo-philosophies lead straight to absolutism and have plunged the world in catastrophe is not to say that Mr. Justice Holmes was a Hitler or would have approved of all the fuehrer's policies.

"Free trade in ideas" *is* incompatible with absolutism. But it is not of itself a defense against that evil. The defense must come from dominance of ideas incompatible with a totalitarian state whether the totalitarianism comes from a spectacularly menacing dictator, a skillful minority whose propaganda has "got itself accepted in the competition of the market" as "truth", or from an amorphous or anonymous majority that need not fear the assassin's knife and may crush out liberty through its controls of the institutions of the state, "policy-making courts" and the manufacturers of "public opinion".

I agree that we must "seek to improve the laws we have". But there's the rub: How improve? What is "improvement"? What are your standards or have you any? On what principle, if any, does Mr. Nossaman characterize the laws preferred by Hitler as "bad" and those preferred by Holmes as "good"? I suspect that notwithstanding his acceptance of the conclusions of Hume, who attacked rational ethics, said "reason is and ought only to be the slave of the passions" and pronounced soul and God to be fictions—conclusions as to natural law not entirely illogical if you accept his premises—notwithstanding, Hume, I suspect that Mr. Nossaman's criteria of "good" and "bad" have not been entirely uninfluenced by twenty centuries of Christianity and of natural law.

Certainly the recurrent appeal to natural law concepts whenever a people are menaced by or seek escape from absolutism, certainly the experience of the race cannot be dismissed as "myth" or "folklore" or "self-deception". Certainly if one tends towards belief in legislative omnicompotence or omnipotence and disbelieves in judicial review or constitutional limitations, his opinions will not be changed by a few magazine articles. And most certainly of all they will not change another man's philosophy. But if an appeal to reason or one based on philosophical principles cannot prevail, at least one can ask another to re-examine his philosophy and can join with others in pointing to the historical record of natural law as a defense against Leviathan. And one can ask the question: What other answer have you?

BEN W. PALMER

Minneapolis, Minnesota

Junior Bar Notes

by T. Julian Skinner, Jr., SECRETARY, JUNIOR BAR CONFERENCE

The annual meeting of the Junior Bar Conference of the American Bar Association will be held as usual in conjunction with, and as a part of, the annual meeting of the American Bar Association. All members of the Conference are urged to attend the annual meeting and to actively participate therein.

Conference Will Meet in Atlantic City on October 27-29

The Junior Bar Conference will begin its meeting on Sunday, October 27 in Atlantic City, New Jersey. The American Bar Association will open its general sessions in Atlantic City the next day and will continue its sessions until later in the week. The Conference's sessions will come to an end on Wednesday, October 30. All sessions of the Conference will be held at Haddon Hall unless otherwise indicated in the program covering the convention.

Delegates from Affiliated Junior Bar Groups Will Meet on Morning of October 27

The first portion of the Conference's annual meeting will consist of the meeting of delegates from state and local junior bar groups which are affiliated with the Conference. The delegates' meeting is an annual affair, and as usual it will be held on the morning of the first day of the annual meeting—in this case on the morning of Sunday, October 27, beginning with breakfast at 9:30 A.M. Each affiliated organization will be entitled to four delegates if it is a State-wide junior bar organization and to two delegates if it is not a State-wide junior bar organization or a part of a State bar association. All such delegates will be considered members of the Conference for all purposes during the annual meeting of the Conference even though they as individuals are not members. All members of State and local junior bar groups are invited to attend the meeting of the delegates and other sessions of the Conference whether or not they are delegates, but they will not have a vote unless they are members or delegates. At the meeting of delegates, ways and means of making junior bar work more effective nationally and locally will be discussed.

First General Session

The meeting of delegates referred to in the preceding paragraph will be followed by a luncheon to which all young attorneys are invited. At 2 P.M. of the same day the Junior Bar Conference will open its first general session. Certain prominent lawyers, including the President and other officials of the American Bar Association, will address the group, and business of the Conference will be transacted. The officers of the Conference will present their reports.

Committees Will Report

Among other matters which will come before the Conference will be the reports of its committees, which reports will be received, discussed, and acted upon.

The nine major committees on activities of the Conference are the following: In Aid of the Small Litigant, Membership, Public Information Program, Relations with Law Students, Restatement of the Law, Traffic Court Improvement, War Readjustment, Procedural Reform Studies, and Co-operation with Junior Bar Groups. In addition to these committees, special committees will also report.

There will be no meetings of the Junior Bar Conference on Monday, October 28, other than certain committee meetings. The Conference will not meet on that day in order that its members may attend the opening assembly of the American Bar Association and participate in other meetings of the Association.

Second General Session of Conference Meets on Tuesday

The second and final session of the Junior Bar Conference will be held on the morning of the next day. At that time all business which was not completed at the first general session of the Conference will be considered and disposed of. The report of the nominating committee will be received, and other nominations may be made from the floor. Officers and certain members of the Executive Council will be elected by written ballot during the day. On page VI herein appears a "Notice to Members of Junior Bar Conference" in which the method of nominating and electing such officers and councilmen is outlined in detail.

Awards Will Be Presented

For the fifth successive year the Junior Bar Conference is offering Awards of Merit to outstanding junior bar organizations affiliated with the Conference. Awards this year will be for excellence in (1) general bar association activity, (2) war work, and (3) promoting the improvement of the administration of justice in traffic courts. Awards in each class will be made to both State and local junior bar organizations by a special committee on awards on the basis of applications received from the various groups. Applications for awards should be submitted in triplicate to the Secretary of the Conference, T. Julian Skinner, Jr., Jasper, Alabama, not later than September 27. All affiliated groups are urged to compete for these awards.

Bar Association News

Idaho State Bar Association

The Idaho State Bar resumed its activities, curtailed during the war, with its annual meeting in Boise, July 19 and 20. Attendance was beyond expectation and the largest in the history of Idaho's Bar.

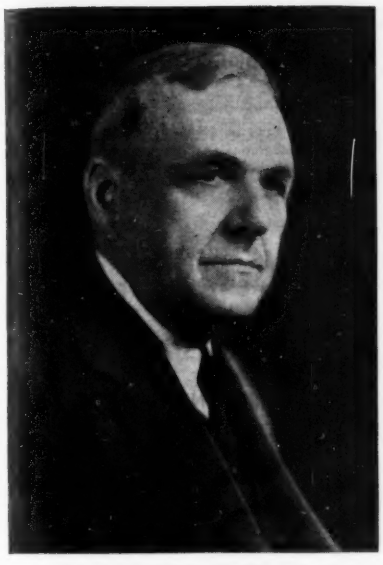
The term of office of Paul T. Peterson as President of the Idaho State Bar Commission having expired, R. D. Merrill of Pocatello, was elected as the new Commissioner. The Board of Commissioners reorganized by the election of E. T. Knudson of Coeur d'Alene as President and E. B. Smith of Boise, as Vice President. Sam S. Griffin of Boise, was retained as Secretary.

Minnesota State Bar Association

The election of officers for the Minnesota State Bar Association during the ensuing year took place at the Annual Convention in St. Paul on June 28. The newly elected officers are as follows: M. J. Galvin, Winona, President; Horace Van Valkenburg, Minneapolis, Vice President; Charles B. Howard, Minneapolis, Secretary; Stephen Schmitt, St. Paul, Treasurer.

During the first day's sessions on June 27 the Honorable Laurance M. Hyde, Justice of the Supreme Court of Missouri, spoke on "Selection and Tenure of Judges Under the Missouri Plan," and Honorable Willis Smith, President of the American Bar Association, spoke on the "Nuremberg and Other War Trials."

During the sessions on the second day, legal clinics on Trusts and Wills, Labor Law and Real Estate Problems were presented. Honorable J. Howard McGrath, Solicitor General of the United States, also spoke on the second day and paid eloquent tribute to the late Harlan F. Stone, Chief Justice of the United States Supreme Court.



EDMUND C. WINGERD

Pennsylvania Bar Association

Four hundred and thirteen members of the Pennsylvania Bar Association registered in attendance at the 51st Annual Meeting held at Atlantic City, from June 27-29, at which the Honorable Edmund C. Wingerd, President Judge of Franklin County, was elected president of the Association for the year 1946-47. Many recommendations and proposals were considered during the meeting that are of interest and importance to not only the State and local Bar Associations, but to the entire profession.

Among these is the proposal for the creation of a World Union for the preservation of peace between nations. It was included in the Annual Address, delivered by the Honorable Owen J. Roberts, Retired Justice of the United States Supreme Court, who was elected vice-president of the Association for the ensuing year.

The Association went on record as recommending a substantial increase in the salaries of the judges of the courts of record of Pennsylvania.

The Committee on Judicial Selection and Tenure advanced the idea of amending the Constitution of Pennsylvania to provide for the adoption of the "Missouri Plan" for the non-partisan selection of judicial candidates for the courts of record of the Commonwealth of Pennsylvania. The Association authorized the Committee to proceed with the drafting of the necessary constitutional amendments and these will be submitted to the profession for careful study prior to the convening of the 1947 Legislature.

Of special interest to local and State Bar Associations is the "One-Hundred Per-cent Membership Plan." In this plan each bona fide member of a local Bar Association automatically carries membership in the State Association.

Another report that may be of assistance to other local and State Bar Associations was presented by Robert T. McCracken, Esquire, chairman of a special committee for the establishment of a permanent home for the Association. The raising of a fund of at least $100,000 for this purpose was discussed. The fund is to be raised on a zone basis and each zone of the Association was allocated a certain quota. The proposal also calls for the creation of a corporation or trust qualified to take title to the real estate and to receive subscriptions and payments to the fund.

Classified

RATES *10 cents per word for each insertion: minimum charge $1.20 payable in advance. Copy should reach us by the 15th of the month preceding month of issue.*

BOOKS

LAW LIBRARIES OR LESSER COLLECtions of esteemed used law books purchased. Our 48-page printed catalog, free on request, lists some used law books we have for sale, also indicates the type of material we will purchase. Claitor's Book Store, Baton Rouge 6, Louisiana.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write NATIONAL LAW BOOK COMPANY, 1110—13th St. N. W., Washington, D. C.

LAW BOOKS BOUGHT, SOLD, EXCHANGED IRVING KOTHS, Metropolitan Bldg., Vancouver, Washington.

LOWEST PRICES—USED LAW BOOKS—complete stocks on hand, sets and texts—Law Libraries appraised and bought. NATIONAL LAW LIBRARY APPRAISAL ASSN., 538 S. Dearborn St., Chicago 5, Ill.

WHEN YOU HAVE A DOCUMENT PROBlem of any kind send for "Questioned Documents, Second Edition," 736 pages, 340 Illustrations, $10 Delivered, also "Questioned Document Problems" (a new book); 546 pages, $6 Delivered. ALBERT S. OSBORN, 233 Broadway, New York City.

USED LAW BOOKS BOUGHT AND SOLD. State Reports, Reporter System units, Digests Amer. Law Reports, Text-Books, Encyclopedias, etc. Correspondence solicited. R. V. BOYLE, Colcord Bldg., Oklahoma City, Okla.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CECIL SKIPWITH, 126 West Third Street, Los Angeles 13, California.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CLARK BOARDMAN CO., LTD., 11 Park Place, New York City.

"THE HAND OF HAUPTMANN." Story of Lindbergh Case by Document Expert. Cited by John Henry Wigmore. 368 Pages. 250 Illustrations. Price $5.00. J. V. HARING & J. H. HARING, 15 Park Row, New York 7, N. Y.

EVERYTHING IN LAW BOOKS. GEO. T. BISEL CO., Philadelphia 6, Pa.

LAW BOOKS BOUGHT AND SOLD FOR Cash. We pay freight. Established 1918. References furnished. JOS. M. MITCHELL, 5738 Thomas Ave., Philadelphia 43, Pa.

SHAW INTERFERENCE TIME SAVER $10.00. Pioneer Publishing Co., Muncie, Indiana.

FOR SALE: ALL BUCKRAM ATLANTIC 1-200, 1-4 (2d) $225.00. Southeastern 1-200, 1-9 (2d) $210.00. New York Supplement 1-300, 1-19 (2d) $325.00. WANTED: Maryland Reports to Reporters and Fletchers Corporate Forms. Mrs. John. R. Mara Law Books, 2709 Lucas Drive, Dallas 9, Texas.

COURT REPORTERS

DEPOSITIONS, OREGON NOTARY, EDWIN L. Holmes, Court Reporter, 545 County Court House, Portland 4, Oregon.

HANDWRITING EXPERTS

EDWARD OSCAR HEINRICH, B. S., 24 CALifornia St., San Francisco, 11. Experienced consulting and scientific laboratory service available when you have a suspected or disputed document problem of any kind. For additional information see Martindale Hubbell Law Directory, San Francisco listings.

SAMUEL R. McCANN, EXAMINER OF Questioned Documents. Office and Laboratory, Ward Building. Telephone 5723—Yakima, Washington.

JOSEPH THOLL, 514 FINANCE BLDG., Cleveland, Ohio. Examiner and Photographer of Questioned Documents. 15 years' experience serving Army Intelligence, the legal profession and official agencies. Photographic Specialist.

INVESTIGATORS

SAN FRANCISCO, CALIF. COMPLETE INvestigation service for attorneys. RAYMOND & HALL, 58 Sutter St., San Francisco 4.

LAW BOOK SALESMAN

WANTED EXPERIENCED LAW BOOK salesman. Reply confidential. Expanding sales program. Box MEJ, AMERICAN BAR ASSOCIATION JOURNAL, 1140 N. Dearborn St., Chicago 10, Ill.

LAWYER WANTED

ESTABLISHED LAW OFFICE EAST ARKansas wants young lawyer. Veteran last war with some experience preferred. Box FB, AMERICAN BAR ASSOCIATION JOURNAL, 1140 North Dearborn Street, Chicago 10, Illinois.

MISCELLANEOUS

DEVANS SECRETARIAL SERVICE. PUBlic stenography, mimeographing, addressing and mailing. Washington address and telephone service available. 1742 K Street, N. W., Washington, D. C., Executive 0634.

WANTED: A LIMITED NUMBER OF THE April, 1946, issue of the American Bar Association Journal. We will pay twenty-five cents a copy if sent to AMERICAN BAR ASSOCIATION JOURNAL, 1140 North Dearborn Street, Chicago 10, Illinois.

POSITIONS WANTED

ATTORNEY, VETERAN, 36, B.S. (ACCOUNTing), LL.B., 5 years in taxes, real estate, probate and casualty insurance before entering Navy. Reentering practice after 5 years Navy including extensive court martial experience. Willing to work hard in exchange for future and guaranteed income with law firm or corporation offering specialization in taxes, probate, corporations or real estate. Box CJ, American Bar Association Journal, 1140 North Dearborn Street, Chicago 10, Illinois.

WASHINGTON REPRESENTATIVE. DISTrict of Columbia attorney, with 20 years' general practice in New York and District of Columbia, wishes to represent responsible law firm in Washington upon release from military service in October. Extensive experience in federal courts and governmental agencies. Also trade association experience. Superior status and references. Degrees: A.B., J.D., S.J.D. Part time professor in law school, and author of several legal publications. Box BS, AMERICAN BAR ASSOCIATION JOURNAL, 1140 North Dearborn Street, Chicago 10, Illinois.

ATTORNEY, DESIRES POSITION WITH Corporation or Law Firm. Knowledge of stenography. Bachelor Science and Doctor Jurisprudence degrees. Travel anywhere. Box NB, American Bar Association Journal, 1140 North Dearborn Street, Chicago 10, Illinois.

JUST SEPARATED FORTY-FOUR YEAR old Ohio veteran desires to locate in or west of Albuquerque, in or south of San Francisco; fifteen years civilian experience general practice and urban transportation (gasoline and electric street railway):—damage cases, finance, accounting, taxation, public and industrial relations; service injury not disabling but lawyer a little stale after five years in Army (Lt. Col.); prefers corporate connection using legal and administrative experience. Box PH, AMERICAN BAR ASSOCIATION JOURNAL, 1140 North Dearborn Street, Chicago, 10, Illinois.

LAWYER, MARRIED, TWO CHILDREN. J.D. University of California Law School. Member Illinois and Supreme Court Bars. Over 4 years' experience trial and appellate litigation in Federal courts. Specialist, labor relations, administrative law. Desires connection with established law firm or business which can use outstanding legal ability, initiative and resourcefulness. Box RM, AMERICAN BAR ASSOCIATION JOURNAL, 1140 North Dearborn Street, Chicago 10, Illinois.

ROBES

JUDICIAL ROBES—CUSTOM TAILORED The best of their kind—satisfaction guaranteed Catalog J sent on request. BENTLEY & SIMON, INC., 7-9 West 36th St., New York 18, N. Y.